Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

JEFFREY HANNAN, PETITIONER

v.

CITY OF PHILADELPHIA, SYLVESTER JOHNSON, KAREN BIRD, KAREN SIMMONS AND WILLIAM BLACKBURN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Defendant Police Commissioner Sylvester Johnson (hereinafter "Commissioner Johnson") accused Officer Hannan of serious misconduct that occurred off duty and was significantly so serious that Officer Hannan demanded a name clearing hearing and was retaliated against. Subsequently filed an arbitration grievance and was again retaliated against. Officer Hannan was subject to discipline for alleged misconduct ranging from suspension without pay to termination. Moreover, Commissioner Johnson testified that his personal belief was Officer Hannan should be fired but should be provided with Due Process offered all Philadelphia Police Officers through the PBI disciplinary system. *See*, Deposition of Police Commissioner Johnson App. II p. 92 (@ 14, 34, 63). Indeed, this name clearing hearing was part of the enumerated formal disciplinary system set up by the City and Commissioner Johnson pursuant to the Home Rule Charter. *See*, Philadelphia Home Rule Charter Section 3-100 App. III p.58-62 and 5.5-200 App. III p.63-64 and Disciplinary Charge, 75-18 App. II p. 45. The name clearing hearing provides due process to Police Officers subject for discipline for misconduct. 53 Pa. Stat. Ann. § 46190; *and See*, Deposition of Police Commissioner Johnson App. II p. 92 (@ 14, 34, 63).

1. Whether Officer Hannan was deprived of interests encompassed within the Fourteenth Amendment's protection of life, liberty, or

property, and the procedures available to him did not provide due process of law?

2. Whether pleading not guilty to a PBI charge of misconduct and filing for arbitration grievance which resulted in transfer and suspension without pay, can, as a matter of law, constitute a petition for redress of grievances under the First Amendment?

3. Whether the conduct which triggered his retaliatory suspension without pay, was protected under the First Amendment and whether Commissioner Johnson did violate his constitutional rights (*Saucier* step one)?

4. Whether the law is clearly established or sufficiently clear that a reasonable Police Commissioner would understand that what he is doing violated a constitutional right such that granting immunity would be improper (*Saucier* step two)?

5. Whether under *Monell* and under § 1983, the City of Philadelphia, caused a constitutional tort through a policy, ordinance, regulation or officially adopted decision that has been promulgated by the municipality's Police Commissioner?

6. Whether defendants deprived Officer Hannan of his property privacy rights by releasing without consent, privilege or authority the Plaintiff's medical and mental health information and in violation of HIPPA and Section 7111 of the Pennsylvania Mental Health Procedures Act?

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Citations For Opinions Below

The Memorandum and Order of the United States District Court, is reported at Hannan v. City of Phila., 2007 U.S. Dist. LEXIS 61613 (E.D. Pa. Aug. 22, 2007). The Third Circuit Reversed and Remanded with instructions the decision of the District Court and is reported at, 306 Fed. Appx. 735, 2009 U.S. App. LEXIS 829 (3d Cir. Pa., 2009). The Third Circuit Affirmed both the Third Circuit and the District Court decision, report at, 2010 U.S. App. LEXIS 22942 (3d Cir. Pa., Nov. 3, 2010).

Basis For Jurisdiction In This Court

The Court of Appeals Denied a Petition for Rehearing *En Banc* on November 23, 2010. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review by writ of certiorari the judgment of the Court of Appeals.

Constitutional Provision At Issue

The First Amendment, applied to the states through the Fourteenth Amendment, provides that Congress shall make no law abridging The right of the people to petition the government for redress of grievances.U.S. Const. amend. I.

Under the Fourteenth Amendment, no state shall deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend XIV, § 1.

A claim under 42 U.S.C.S. § 1983 Every person who, under color of any statute, ordinance, regulation,

custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Officer Hannan demanded a hearing to clear his name before the Police Board of Inquiry ("PBI"), which heard the charges and rendered a unanimous not guilty verdict. *See*, PBI Verdict Sheet dated 6/5/03 App. III p.11. Notwithstanding, Police Officer Hannan was transferred and 193 days after filing an arbitration grievance for said transfer, suspended for 15 days without pay by Commissioner Johnson . *See*, Arbitration Grievance for the transfer filed 6/20/03 App. III p.13 and Notice of Suspension without pay: Served @ 12/11/03 App. III p.14-16.

The District Court found there was a triable Petition Clause claim against Commissioner Johnson, no qualified immunity and found municipal liability under Monell because Officer Hannan was engaged in Petition Activity in seeking to clear his name through the PBI process and a jury would have to decided the "historical" facts that were material and in dispute, and would have to decide the Commissioner Johnson's motive for disciplining Hannan more harshly following Hannan's election to seek a name clearing hearing and even more so for filing an arbitration grievance. All other claims were dismissed by summary judgment. Hannan v. City of Phila., 2007 U.S. Dist. LEXIS 61613 (E.D. Pa. Aug. 22, 2007). The Commissioner filed an interlocutory appeal which was granted. Hannan v. City of Philadelphia, 306 Fed. Appx. 735, 2009 U.S. App. LEXIS 829 (3d Cir. Pa. 2009).[1] Hannan appealed the

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[1] [l]awsuits and grievances directed at a government

decisions, holdings, findings and rationale in both decisions cited above which was denied. Hannan v. City of Phila., Et al., 09-1562.

Reasons For Allowance Of The Writ Of Certiorari

The Police Board of Inquiry (hereinafter "PBI") is charged administratively under the written Policy of the City of Philadelphia and Police Commissioner, through the "Mission Statement", and the Police Directives and the Disciplinary Code with the duty to render a verdict upon the evidence. *See*, Mission Statement App. III p.21, Directive 79: Disciplinary Procedure App. III p.22-34, and Disciplinary Code App. III p.35-47. Office Hannan was retaliated against twice for constitutionally protected conduct: first in pursuing a name clearing hearing, and

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employer or public officials which invoke the formal mechanism for the redress of grievances are protected petitions under the First Amendment, even where they only address matters of private concern. *San Filippo v. Bongiovanni*, 30 F.3d 424, 439-40 (3d Cir. 1994). In this case, however, the Charging Unit brought formal disciplinary charges against Hannan and presented them to him with instructions to either "plead guilty and waive a hearing" or "plead not guilty and request a hearing." Hannan was merely a responsive party; the process was invoked by the Charging Unit, a component of the PBI. Hannan did not, as he alleges, initiate or invoke the PBI process; he was ordered to cooperate and his compelled plea does not fall within the constitutional protections for petitions to the government. See Foraker v. Chaffinch, 501 F.3d 231, 238 (3d Cir. 2007).Hannan v. City of Philadelphia, 306 Fed. Appx. 735, 738 (3d Cir. Pa. 2009).

second, after filing an arbitration grievance through the Collective Bargaining Agreement of the Union (hereinafter "arbitration grievance"). The enumerated pre-termination procedure of the Philadelphia Police Department is three fold: (1) the Command Level Investigations[2], (2) the Charging Unit of the PBI and (3) the PBI name clearing hearing. All three made findings regarding the accusations against Officer Hannan; that being, that no misconduct occurred by Officer Hannan warranting any imposition of discipline. *See*, Command Level Investigation Findings dated 2/20/03 App. III p.4-5, Charging Unit Findings dated 2/21/03 App. III p.6 and Request to Reinstate to Active Duty dated 2/21/09 App. III p.7. Hence, due process should have been concluded since both the informal and formal pre-termination which is necessary to serve as an initial check against a mistaken decision and to determine whether reasonable grounds exist to support the adverse employment action found no misconduct warranting discipline. *Id.; and See, Pennsylvania Social Services Union, Local 668 v. Department of Labor & Industry,*

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[2] If the command level investigation satisfies the pre-termination requirements and inherent in its purpose is to minimize wrongful adverse employment action through suspension, discipline or termination then at each level of the defendant's disciplinary process, Officer Hannan's constitutional rights were violated and he was repeatedly retaliated against by the Police Commissioner for not pleading guilty and for exercising his right to due process. Second, the defendants responded with retaliatory action sufficient to deter another police officer of ordinary firmness from exercising his First Amendment rights.

105 Pa.Commonwealth Ct. 264, 524 A.2d 1005 (1987). As such, each retaliation which followed was unlawful.

The constitutional violations are intertwined and on-going. Although, factually and procedurally different than those alleging similar violations in case law, this is not fatal to the ultimate constitutional violation. By parallel comparison and analysis which focuses upon the result of the process not the availability of the process itself, the violations are patently obvious using the same rationale under the totality of these circumstances.

On October 22, 2002, Officer Hannan was accused of off-duty misconduct. On October 27, 2002, Officer Hannan was notified of the accusations against him by his commanding officer, and without hesitation proclaimed innocence; however, he was immediately reassigned from the Narcotics Strike Force active duty to the Differential Police Response Unit [3] (hereinafter "DPR") without an opportunity to respond. *See*, Officer Hannan's Employee History Record App. III p.12. The Formal Disciplinary system of the Philadelphia Police Department is initiated when a commanding officer determines there are grounds for discipline and subsequently submits said findings to the PBI: a Form 75-18 (or

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[3] DPR is a unit which operates inside of the Police Building Round House at 8th & Race. Essentially the unit fields telephone complainants from private citizens. There is no street duty ever conducted in this assignment. The unit compromises mainly of police officers who are accused of wrong-doing.

Charge Sheet), a memorandum requesting disciplinary action, an investigation packet containing witness interview and pertinent documents, and, if applicable, the Internal Affairs Division report on its intent to take disciplinary action. *See,* Disciplinary Charge App. II p.45. The Form 75-18 resembles a police report, including a list of Disciplinary Code sections allegedly violated with a supporting narrative of factual allegations. *See,* Directive 79: Disciplinary Procedure App. III p.22-34. Once the Form 75-18 and supporting documentation are submitted to the PBI, they are reviewed by the PBI Charging Unit, which was established in December 1999. *See,* Disciplinary Code App. III p.36.

The Charging Unit, which determines what charges should be brought under the Disciplinary Code, attempts to insure consistency, from Police District to Police District and across racial and gender lines, in the charges brought against officers accused of similar improper conduct. *See,* Mission Statement App. III p.21. and IAO, Report on Disciplinary System 2 (March 2001)(*Ceisler Report).* Once the Charge Sheet is finalized by the Charging Unit, the PBI assigns the matter a Control Number and returns the sheet to the accused's commanding officer, who presents the materials to the officer. *See,* Directive 79: Disciplinary Procedure App. III p.24. Cases which qualify are resolved through a mechanism known as Command Level Discipline, by which the commanding officer imposes the sanction without the availability of a formal hearing before the PBI. *See,* Directive 79: Disciplinary Procedure

App. III p.29-30. Command Level Discipline only may be imposed if the charged officer's maximum exposure is a penalty of five days suspension or less and the officer pleads guilty. *See* Directive 79: Disciplinary Procedure App. III p.30.

If the officer pleads guilty and accepts Command Level Discipline, he or she relinquishes the right to challenge the sanction imposed by the commanding officer through PBI or grievance arbitration. Id. At 30-31. If an officer is either ineligible for Command Level Discipline or declines it, the commanding officer prepares additional copies of the Form 75-18 and supporting documents and forwards them up the chain of command to the Inspector, Chief Inspector, Deputy Commissioner, and, finally, the Commissioner for either approval or disapproval and amendment. *See* , Directive 79: Disciplinary Procedure App. III p.31.

If the Commissioner utilizes the Direct Action mechanism, the Commissioner simply imposes the penalty that he believes appropriate for the alleged misconduct with no right to demand a PBI hearing. *See*, IAO, Report on Disciplinary System 2 (March 2001)(*Ceisler Report).* If this process is applied, an officer who disagrees with the result may proceed directly to grievance arbitration.

Where CDA is not applied and the Police Commissioner approves the Charge Sheet, 75-18s, the matter is returned to the PBI. Upon presentation of the Charge Sheet, 75-18s, the subject officer may choose to plead guilty and thereby avoid the subsequent Formal Disciplinary system.

Otherwise, they choose to demand a PBI hearing by pleading not guilty. Charged officers are typically represented by experienced trial attorneys retained by the FOP on the officers' behalf. In rendering a decision, a PBI panel is required to explain its decision in writing only if it acquits on all charges brought against the officer. *See*, Mission Statement App. III p.21; *and See*, IAO, Report on Disciplinary System 2 (March 2001)(Ceisler Report). Consequently, guilty verdicts, split decisions, and offense downgrades usually are unexplained. Id. If the PBI panel finds the charges have been proved, findings are issued and a recommendation for punishment/penalty is forwarded to the Commissioner. *See*, Directive 79: Disciplinary Procedure App. III p.31.

Thereafter, the Commissioner is free to accept or reject the punishment and impose his own punishment pursuant to the Commissioner's Direct Action. *See*, Excerpt from the Police Disciplinary Code App. II p. 53. The disciplinary Code in "no way limits any penalty which the Commissioner may impose." Id. The officer may then file an arbitration grievance of the punishment. *See*, Excerpt from Collective Bargaining Agreement App. II p. 50. In the process that follows, the police department and the officer's lawyer may negotiate the findings and discipline before the case reaches arbitration grievance, and if they agree, settle the case. *See*, Excerpt from Collective Bargaining Agreement App. II p. 50. At the conclusion of the formal disciplinary process, a sanctioned officer may challenge any sanction exceeding a reprimand through a three-step

grievance process culminating in arbitration grievance. *See,* Excerpt from Collective Bargaining Agreement App. II p. 50.

The Act 111 Award between the City and the FOP incorporates a multi-step grievance procedure that the FOP may invoke to appeal from the Police Commissioner's formal disciplinary findings; as such, pursuant to the collective bargaining agreement, no state cause of action is available to remedy a constitutional injustice. *See,* Excerpt from Collective Bargaining Agreement App. II p. 51-52. Nor does the existence of arbitration grievance remove the designation that the Police Commissioner is the policy maker on discipline. Arbitration grievance has no affect upon the powers vested in the Police Commissioner.

In the matter *sub judice*, Captain Matefy, PBI Captain of the Charging Unit, concurred with Captain Broadbent's recommendation that there was to be no discipline against Officer Hannan and that Officer Hannan be returned to work from DPR back to the NSF. *See,* Charging Unit Findings dated 2/21/03 App. III p.6. Notwithstanding, Captain Matefy's findings that Officer Hannan not be charged at the PBI level, the Police Commissioner ordered Captain Matefy charge Officer Hannan unless he agreed to be transferred to a patrol district. *See,* Disciplinary Charge App. II p. 45 and Deposition of Jeffrey Hannan App. II p.54-90. Still no CDA taken. Furthermore, Commissioner Johnson directed the Charging Unit to create charges against Officer Hannan since none of the enumerated charges were

sufficient for charging. *See,* Disciplinary Code App. III p.35-47. The first set of charges were deemed insufficient and a second set of charges had to be drafted. *See,* First Set of Charges dated 3/4/03 App. III p.8, Rewrite the Charges dated 3/6/09 App. III p.9 and Second Set of Charges dated 3/13/03 App. III p.10.

Officer Hannan plead not guilty; thereby demanding a hearing. *See,* Disciplinary Charge App. II p. 45. Following the PBI ruling unanimously in favor of Officer Hannan, Captain Broadbent ordered Officer Hannan back to the NSF to perform narcotics work; within hours of Officer Hannans' reinstatement to active street duty, he was informed by Captain Broadbent that he was to remain on desk duty inside. *See,* Request to Reinstate to Active Duty dated 2/21/09 App. III p.7. Five days later and notwithstanding the PBI verdict, Commissioner Johnson imposed discipline upon Officer Hannan and transferred Hannan to the 18th District, not a district of Hannan's choice, and further from his home geographically than any other available police district. *See,* Officer Hannan's Employee History Record App. III p.12; And Deposition of Captain Broadbent, Jr App. III p.99-114.

Moreover, 196 days later and following Officer Hannan's filing for arbitration grievance, on December 11, 2003, Commissioner Johnson served a Notice of Suspension, suspending Hannan from duty without pay for 15 days. *See,* Notice of Suspension without pay: Served @ 12/11/03 App. III p.14-16. The investigation against Officer Hannan was subject

to Command Level investigation. *See,* Command Level Investigation Findings dated 2/20/03 App. III p.4-5. As such, Officer Hannan faced a maximum five day suspension at the onset of this investigation. *See,* Directive 79: Disciplinary Procedure App. III p.29. Captain Broadbent was ordered to do a Command Level investigation. *See,* Deposition of Captain Broadbent, Jr App. III p.99-114. Commissioner Johnson imposed even harsher discipline then if Officer Hannan had been subject to Command Level Discipline or if had he plead guilty at any time during this anomalous process. *See,* Notice of Suspension without pay: Served @ 12/11/03 App. III p.14-16 and Deposition of Jeffrey Hannan App. II p.54-90.

Therefore, not only did Officer Hannan receive a harsher punishment despite the not-guilty PBI verdict, but he received an even more severe punishment after filing for grievance arbitration. Id. Blatant retaliation for Petition Activity. The Disciplinary Code makes it clear that the PBI recommends penalties and thereafter, the Commissioner is not limited in the penalties which he may impose. *See,* Disciplinary Code App. III p.37. However, it does not resurrect the Commissioners' ability under CDA upon a PBI finding of not guilty. Id. He must adhere to the enumerated regulations as every other police officer within his command. *See,* Disciplinary Code App. III p.35-47 and Directive 79: Disciplinary Procedure App. III p.22-34.

1. **Officer Hannan was deprived of interests encompassed within the Fourteenth Amendment's protection of life, liberty,**

or property, and the procedures available to him did not provide due process of law.

Once the PBI hearing concluded that Officer Hannan's conduct warranted no finding of misconduct, he should not have been disciplined, this was the absolute conclusion of the formal disciplinary process set up since 1999 by the Philadelphia Police Department and adopted under the command of Commissioner Johnson. When the Fourteenth Amendment due process scheme is demanded to clear one's name of formal charges, then the process must be honored if the process is to be valid or adequate. Otherwise, any officer acquitted of wrongdoing would never be afforded due process and would suffer irreparable harm while obtaining available remedies at law. *See,* Excerpt from Collective Bargaining Agreement App. II p. 50. Wherefore, a finding of not guilty means the process has concluded to its natural end and the Police Officer must be restored to his same place as just prior to the imposition of charges to be made whole again and receive full vindication to his name, reputation and property.[4] The availability of arbitration grievance does not alleviate Commissioner Johnson's duty to set policy or to act

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[4] Officer Hannan used the arbitration grievance process and without question prevailed in the process since the Police Commissioner acted improperly and without just cause. Arbitration Award App. II p. 49

pursuant to the law. And in no uncertain terms, to avoid committing unlawful actions, i.e.: retaliation and intentionally ignoring the processes finding, result and remedy, which would necessitate the need for filing for grievance arbitration. Furthermore, from the onset of this process, the undue delay that occurred between the accusations against Officer Hannan and the ultimate relief at Arbitration amounted to 977 days to obtain real due process. "[A]violation of the laws has been established. If the end result is unlawful, it matters not that the means used in violation maybe lawful." California Motor Transport Co. v. Trucking Unltd, 404 U.S. 508, 512 (U.S. 1972).

More importantly, the City and the Philadelphia Police Department had a duty to provide a mechanism to redress deprivation of property rights which was through the PBI process since 1999. *I*ts safeguards were ignored and purpose overlooked. It was rendered procedurally deficient by the deliberate actions of Commissioner Johnson following the conclusion of the hearing. As such, the process was inadequate to effectuate due process and said deprivation caused harmed to Officer Hannan's reputation (liberty interest) and property (employment pay, overtime pension and promotional opportunity). It was rendered substantively deficient since Commissioner Johnson retaliated against Officer Hannan for demanding the hearing in the first instance and prevailing at the hearing which unanimously found that no misconduct had occurred nor was discipline to warranted. In Loudermill, the Court noted that the purpose of a pre-termination

hearing is to determine "whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action." 470 U.S. at 545-546. By parity of reasoning, the purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay. *Cf.* Mallen, 486 U.S. at 240.

> [i]n the case of a suspension there will be ample opportunity to invoke discretion later--and a short delay actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges. Respondent "has an interest in seeing that a decision concerning his or her continued suspension is not made with excessive haste." *Mallen*, 486 U.S. at 243. If the State is forced to act too quickly, the decision maker "may give greater weight to the public interest and leave the suspension in place." Ibid.

Gilbert v. Homar, 520 U.S. 924, 934-935 (U.S. 1997).

When considering whether the State has provided all the process that is due in depriving an individual of life, liberty, or property, we must look at both pre- and post-deprivation process. *See Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 547, n. 12, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) *Bd. of Ed. v. Loudermill*, 470 U.S. 532, 547, n. 12, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) ("[T]he existence of post-termination procedures is relevant to the necessary scope of pretermination

procedures"); *see also National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995); [*249] *Mathews v. Eldridge*, 424 U.S. 319, 349, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

> There is no principled reason this Court should refuse to allow § 1983 suits to challenge part of this process -- the trial proceedings -- but bless the use of § 1983 to challenge other parts.

Skinner v. Switzer, 131 S. Ct. 1289 (U.S. 2011).

Additionally, the Defendants concede that Philadelphia Police Officers have a cognizable property interests in their positions as police officers that are sufficient to trigger the procedural due process protection of the Fourteenth Amendment. *See Copeland*, 840 F.2d at 1144 (Philadelphia police officers have a cognizable property interest in their jobs); *Gniotek v. City of Philadelphia*, 808 F.2d 241, 243 (3d Cir. 1986) *cert. denied*, 481 U.S. 1050, 107 S. Ct. 2183, 95 L. Ed. 2d 839 (1987) (same). The process afforded these officers fails to meet the fourteenth amendment standard when the Due Process provided to is not honored; thereby invalidating the entire process and, here, causing harm to Officer Hannan from the retaliatory acts of Commissioner Johnson.

2. **Pleading not guilty to a PBI charge of misconduct and filing for arbitration grievance which resulted in transfer and suspension without pay can, as a matter**

of law, constitute a petition for redress of grievances under the First Amendment.

Officer Hannan's transfer to the 18th district and subsequent suspension was motivated because of Hannan's decision to (1) demand a name clearing hearing; rather than accept the factual allegations and accusation of misconduct and accept the discipline offered to him prior to his demanding the PBI hearing to clear his name, which resulted in a unanimous finding of not guilty at the PBI and (2) Officer Hannan, responded by filing an arbitration grievance under the Collective Bargaining Agreement to challenge the retaliatory actions of Commissioner Johnson which resulted in the imposition of a 15 day suspension without pay. *See*, PBI Verdict Sheet dated 6/5/03 App. III p.11; Arbitration Grievance for the transfer filed 6/20/03 App. III p.13 and See, Notice of Suspension without pay: Served @ 12/11/03 App. III p.14-16.

Demand for Arbitration Grievance

It is well-settled that a petition in the form of filing an arbitration grievance pursuant to a collective bargaining agreement is protected activity within the ambit of the First Amendment's petition clause[5]. San Filippo, 30 F.3d at 434-43. On June 20, 2003, and December 17, 2003, the arbitration grievance petitions were filed and sustained, and

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[5] Any formal, written complaint or allegation about conduct in the workplace that an employee seeks management assistance in resolving.

therefore each petition qualifies as protected speech. *See* Lohman v. Duryea Borough, 183 L.R.R.M. 2297, *33 (M.D. Pa. Nov. 29, 2007) (finding that union grievance qualified as protected activity under the Petition Clause); *and see* Arbitration Grievance for the transfer filed 6/20/03 App. III p.13and Arbitration Grievance for the suspension filed 12/17/03 App. III p.18. The retaliation against Officer Hannan after filing for arbitration grievance was unlawful.

Demand for the PBI Name Clearing Hearing

Petition activity is not limited to "petitions" exclusively to grievances made to an external government entity. Blue v. Koren, 72 F.3d 1075, 1082 (2d Cir. N.Y. 1995).

> However, a right to defend oneself against a formal charge without being subjected to retaliation by government officials may be easily derived either from the right to a hearing under the Due Process Clause or from the First Amendment right to petition the government. If those who defend themselves against formal charges may be subjected to harassment by officialdom for doing so, the right to a hearing is clearly of greatly diminished value. Moreover, defending against a formal charge is sufficiently analogous to petitioning the government for retention of the status quo to warrant First Amendment protection against retaliation.

Blue v. Koren, 72 F.3d 1075, 1082 (2d Cir. N.Y. 1995).

The Constitution must interfere with a public employer's ability to impose discipline more harshly upon its Officers than if those Officers had acknowledged their misconduct and accepted punishment. *See*, Defendant's Appellate Brief, 07-4548 document : 00311906429, page 15. The questions become: (1) Why shouldn't the Constitution interfere with a public employer's ability to impose discipline more harshly upon an officer than if the officer acknowledged his misconduct and accepted his punishment and (2) What is the purpose of a PBI name clearing hearing? And (3) If the Police Commissioner is free to impose retaliatory penalties without regard to the Constitutional Rights of the employees then why provide for the name clearing hearing and PBI in the first instance?

If by an officer invoking their due process right to said hearing are subject to lawful retaliation because of semantics, does not make sense. The disciplinary process would be rendered futile, senseless and a phantom for providing any redress or checks and balances: if the Police Commissioner admits to imposing harsher discipline after an Officers election to have a PBI hearing to clear his name, or if he does not like the result of the PBI, or does not agree with the result then the Police Commissioner is permitted to impose harsher sanctions without fear that those actions fall within Constitutional scrutiny. Officer Hannan,

> [i]nstituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." Id. The nature of the situation, of course, determines whether First Amendment rights may be invoked; "but they may bear upon a purpose to deprive the competitors of meaningful access to the agencies and courts... [s]uch a purpose or intent, if shown, would be "to discourage and ultimately to prevent the respondents from invoking" the processes of the administrative agencies and courts and thus would be classified as protected Petitioning Activity. By their power thus to disclose problems within a government agency, petitions can serve as a check on such misconduct, as well as a spur to addressing it.

California Motor Transport Co. v. Trucking Unltd, 404 U.S. 508, 512 (U.S. 1972).

Should any Philadelphia Police Officer sense that because they demand a name clearing hearing against the government officials who have claimed some wrongdoing against said Police Officer would in turn face retaliation for same or worse, discharge, it would effectively strip the Police Officer of any redress and more importantly empower the Police Department through the Police Commissioner to continued and ongoing misconduct and violating a Police Officers constitutional rights to both due process and against retaliation while hiding behind

the process that comes after the PBI process *vis-a-vis* Arbitration Grievance through the Collective Bargaining Agreement.

Furthermore, no evidence in the record supports the proposition that Officer Hannan was ordered, compelled or forced to respond. It simply does not exist. This is petition activity. It is counter-intuitive to put into operation a system required to provide for Due Process, to clear one's name through PBI that would not deter official misconduct vis-à-vis retaliation or act to discourage a police officer from asserting his rights for fear of retaliation of any kind. Id.

How could it be suggested the men and women who make up the Philadelphia Police Department are not participating in protected Petition Activity when they seek established enumerated relief to due process redress to clear one's name after being falsely accused of any degree of misconduct subjecting them to suspension without pay or termination through a formally implemented Disciplinary Process set up by the Philadelphia Police Department? To assume this to be true or even worse to presume this was the intention of Framer's of those same First Amendment Constitutional guarantees would render every police officer's protections less than that of other citizens. Ironically, those who swear to protect, serve and to uphold the Constitutional Rights of the citizens to not be entitled to the same. Gallen-Ruiz v. City of Phila., 2008 U.S. Dist. LEXIS 57357, 21-24 (E.D. Pa. July 21, 2008). The Opinion of the Third Circuit Court in Hannan v. City of Philadelphia, et

al, Document 003110336584 (November 3, 2010) supports the proposition that the conduct of defendants was permissible , should be ignored and worse, free from constitutional scrutiny because the PBI system is not flawed and does not warrant any constitutional protection.

Under 53 Pa. Stat. Ann. § 46190, the police officer could not be suspended or terminated without just cause. Under Pennsylvania law, even when union grievance procedures permitted a police officer to challenge his suspension after the fact, a brief and informal pre-termination or pre-suspension hearing is necessary. Schmidt v. Creedon, 2011 U.S. App. LEXIS 6303 (3d Cir. Pa. Mar. 29, 2011)(adequate process before discharge with notice describing the conduct that is the basis for suspension.); *and See,* The Philadelphia Home Rule Charter Section 7.7-303 of (Charter), 351 Pa.Code § 7.7-303, and Section 7.7-401(q); *and See,* Philadelphia v. Fraternal Order of Police, Lodge No. 5, 138 Pa. Commw. 219, 226 (Pa. Commw. Ct. 1991). No substantial countervailing interest in protecting the public from improper police conduct, supports the procedures or actions used to discipline Officer Hannan; therefore, due process was violated as well as violation of the First Amendment. City of Phila. v. FOP, 160 Pa. Commw. 272, 281 (Pa. Commw. Ct. 1993).

It is undisputed that the PBI is the Formally adopted disciplinary scheme of the Philadelphia Police Department. Furthermore, Commissioner Johnson explained that the PBI is provided because the police officers are entitled to Due Process. *See,* Deposition of Police Commissioner Johnson App. II p.

92 (@ 14, 34, 63). "[I]f the Constitution requires [and an employer specifically provides for] pre-termination procedures, the most thorough and fair post-termination hearing cannot undo the failure to provide such procedures."Elsmere Park Club, L.P. v. Town of Elsmere, 542 F.3d 412, 417 (3d Cir. Del. 2008)(*quoting* Alvin v. Suzuki, 227 F.3d 107, 120 (3d Cir. 2000)). These rules were clearly established in 1999, by the Philadelphia Police Department and in effect at the time of the police officer's suspension. Therefore, the defendants are not entitled to qualified immunity. Id.

Indeed, Officer Hannan was provided with a pre-deprivation hearing as well as a post-deprivation union grievance and participated in the arbitration procedures made available to him through the Collective Bargaining Agreement. However, the availability of state post deprivation remedies does not bar a § 1983 suit. Deprivation is unconstitutional irrespective of the procedural protections accompanying arbitration grievance which are offered by the state. Begg v. Moffitt, 555 F. Supp. 1344, 1365 (N.D. Ill. 1983).

It is not the sufficiency of the post-deprivation union grievance procedures, nor whether a valid pre-deprivation hearing was given to Officer Hannan that is in issue; Commissioner Johnson retaliated against Officer Hannan for asserting his right to a name clearing hearing through the PBI which is protected petition activity and ignored it's results. To make matters worse, ignoring the results of the PBI is another form of retaliation.

3. **The conduct which triggered his retaliatory transfer and suspension without pay, was protected under the First Amendment and Johnson did violate his constitutional rights (*Saucier* step one).**
4. **The law is clearly established or sufficiently clear that a reasonable official would understand that what he is doing violated a constitutional right such that granting immunity would be improper (*Saucier* step two).**

The United States Supreme Court has stated that if the law is firmly established, the qualified immunity defense should normally fail because a reasonably competent official should know the law governing his conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). If Officer Hannan was retaliated against for Petition Activity and if he was retaliated against because of the exercise of his First Amendment Rights, a qualified immunity defense must fail because the law is firmly established on these issues. "In other words, there is simply no possibility that a competent government official could believe that he or she can remove an individual from [work] because of his or her viewpoint, or retaliate for the exercise of free speech." *Id.*

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he

confronted." Montanez v. Thompson, 603 F.3d 243, 251 (3d Cir. Pa. 2010))(*quoting* Saucier, 533 U.S. at 201 (*citing* Wilson v. Layne, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999))); *and See*, Southerland v. Commonwealth, 2010 U.S. App. LEXIS 16559 (3d Cir. Pa. Aug. 6, 2010). Because this inquiry focuses on the official's actual situation, the analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition . . . ." Id. The question is whether, "in light of pre-existing law," the "contours" of the plaintiff's rights were sufficiently clear such that the unlawfulness of the officer's conduct, in the specific circumstances that he confronted, would have been apparent to a reasonable person. Southerland v. Commonwealth, 2010 U.S. App. LEXIS 16559 (3d Cir. Pa. Aug. 6, 2010)(*citing Paff v. Kaltenbach*, 204 F.3d 425, 436 (3d Cir. 2000)). Along with the right against retaliation for First Amendment Petition Activity, so to are these laws clearly established and deep rooted: the Philadelphia Home Rule Charter, The Mission Statement of the Philadelphia Police Department, The Philadelphia Police Directives especially number 79: The Disciplinary Procedure App. III, and Disciplinary Code App. III, and 53 Pa. Stat. Ann. § 46190. This remains undisputed. As such, to manipulate a disciplinary system and retaliate against said police officer for wanting to clear his name or after filing for arbitration grievance and then subject police officers to serve an imposition of some form of punishment without having to provide much less expect constitutional safeguards is unreasonable and against all bounds of decency.

More specifically, since the ability to clear one's name "[is] often the only effective channel for keeping within bounds official arrogance and lawlessness..." and since 1999, the PBI process allows a Police Officer to demand a hearing for redress, it must be afforded without fear of retaliation and with expectation that due process will be honored. This right should not be abrogated by the ability of the Police Commissioner to retaliate against said officer for his demand to clear his name or after filing for arbitration grievance nor permit the Police Commissioner to ignore its results. Or worse, claim that he did not know his retaliatory actions were unlawful. Once the Police Commissioner declines to impose Commissioner's Direct Action, the inherent right of a police officer to petition for a PBI is absolute NOT compulsory. *See*, Directive 79: Disciplinary Procedure App. III p.22-34 2and Disciplinary Code App. III p.35-47. Surely, it is abundantly clear that retaliation following a name clearing hearing as well as the filing of an arbitration grievance is unlawful.

> No less well established is the principle that government officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. Surely anyone who takes an oath of office knows - or should know - that much. *See Hill*, 482 U.S. at 462. Whether or not officer Aguilar was aware of the fine points of First Amendment law, to the extent he is found

> to have detained Duran as punishment for the latter's insults, we hold that he ought to have known that he was exercising his authority in violation of well-established constitutional rights.

Houston v. Hill, 482 U.S. 451 (U.S. 1987).

What is controverted are the facts that could render Commissioner Johnson answerable for crossing a clear constitutional line and the credibility of the purported claim that if there was petition activity, Commissioner Johnson did not know because it was not clearly established. In, Justice v. Danberg,

> [T]he Court found that "we lack jurisdiction over the appeal from the District Court's order denying summary judgment. The court did not deny summary judgment based on its analysis of qualified immunity; rather, it stated it was denying summary judgment because it could not yet determine whether there had been a constitutional violation and thus could not decide the first prong of the qualified immunity analysis. Indeed, the court said specifically that it "reserve[d] judgment on the issue of qualified immunity until such time as an actual constitutional violation has been identified." (App. 22.)

Justice v. Danberg, 2009 U.S. App. LEXIS 18545, 6-7 (3d Cir. Del. Aug. 17, 2009).

> A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice." Arizona v. California, *supra*, at 618, n. 8 (citation omitted). Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was "clearly wrong" it was obliged to decline jurisdiction. Most importantly, law of the case cannot bind this Court in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review. Panama R. Co. v. Napier Shipping Co., 166 U.S. 280, 283-284, 41 L. Ed. 1004, 17 S. Ct. 572 (1897). Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review. *See* Messenger, *supra*, at 444; Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 257-259, 60 L. Ed. 629, 36 S. Ct. 269 (1916).

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817-818 (U.S. 1988).

The "law of the case" doctrine is "directed to a court's common sense" and is not an "inexorable command." Petition of U.S. Steel Corp 479 F.2d at 494. Reconsideration of rulings are favored where a decision is clearly erroneous and would work a manifest injustice. Coal Resources, 865 F.2d at 766 (citations omitted).

Officials can be on notice that their conduct violates established law even in "novel factual circumstances". Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)(*quoting Anderson, supra*, at 640." 74 F.3d 266 at 270-271 (citation omitted)). If a jury found that Defendants acted with an unlawful motive or intent, by definition, their conduct would not be reasonable. MFS, Inc. v. DiLazaro, 2009 U.S. Dist. LEXIS 89125, 61-62 (E.D. Pa. Sept. 25, 2009). For all intents and purposes, the PBI hearing provides for all the protections and redress of petitioning activity as enumerated in theory and practice by the Philadelphia Home Rule Charter, The Mission Statement of the Philadelphia Police Department, The Philadelphia Police Directives especially number 79, The Disciplinary Procedure App. III, and Disciplinary Code App. III, and 53 Pa. Stat. Ann. § 46190; if it walks like a duck, acts like a duck, talks like a duck; therefore, it must fall within constitutionally protected petitioning activity.

5. **Under *Monell*, and under § 1983, the City of Philadelphia, caused a constitutional tort through a policy, ordinance,**

regulation or officially adopted decision that has been promulgated by the municipality's Police Commissioner.

The policymaker of the Philadelphia Police Department is the Police Commissioner. Id., (*citing* Andrews, 895 F.2d at 1481)(Police Commissioner is a policymaker for the City's Police Department); *and See* Keenan, 983 F.2d 459, 468-69 (3d Cir. 1992)(emphasis added); Jacobs v. City of Phila., 2004 U.S. Dist. LEXIS 24908, 2004 WL 2850081, at *4 (E.D. Pa. Dec. 10, 2004); Martin v. City of Phila., 2000 U.S. Dist. LEXIS 49, 2000 WL 11831, at *9 (E.D. Pa. Jan. 7, 2000). The authority vested in the Police Commissioner by and through the Home Rule Charter explicitly grants unto him complete and unequivocal authority over disciple within the Philadelphia Police Department. Each Directive adopted or implemented by him is granted by the City to the Police Commissioner as Department head of the Philadelphia Police Department. *See*, Philadelphia Home Rule Charter Section 3-100 App. III p.58-62 and 5.5-200 App. III p.63-64 and Disciplinary Charge, 75-18 App. II p. 45.

Furthermore, in 2009, the District Court in Pelzer V. City Of Philadelphia, held, "Defendant Police Commissioner Johnson's actions clearly amount to deliberate indifference. He is, without a doubt, the head of the Philadelphia Police Department. 351 Pa. Code. Sec. 3.3-102. As such, and admittedly so, Defendant Police Commissioner Johnson is a policy maker and has the final authority on all decisions relating to the Philadelphia Police

Department". Pelzer V. City Of Philadelphia, 2007 U.S. Dist. Ct. Motions 345601 (E.D. Pa. Apr. 17, 2009)(City Reply Brief to Summary Judgment) (emphasis added). Pelzer v. City of Phila., 656 F. Supp. 2d 517, 523 (E.D. Pa. 2009).

For any Philadelphia Police Commissioner to hold this power, opens the door to a myriad of issues; but also, permits the Police Commissioner to use the enumerated disciplinary scheme as a manipulative personal tool over police officers and/or for media grand-standing whereby, choosing some outlandish imposition of discipline knowing full well that some two to three years later while the police officer has already begun to serve said discipline, maybe even having been fired, the police officer is vindicated through Arbitration. Clearly, a prior ruling on a material matter that is blatantly unreasonable and obviously wrong. Person v. Wynder, 2005 U.S. Dist. LEXIS 21018 (E.D. Pa. Sept. 23, 2005) (*quoting* Ellis v. United States, 313 F.3d 636, 648-49 (1st Cir. 2002)

Interesting, in St. Louis v. Praprotnik, 485 U.S. 112, 170 (U.S. 1988), Justice Brennan wrote in the part of his opinion that commanded a majority of the Court:

> "[A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act

> of official government policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Pembaur v. Cincinnati*, 475 at 481 (footnote omitted).

St. Louis v. Praprotnik, 485 U.S. 112, 170 (U.S. 1988).

"A high official who has ultimate control over a certain area of city government can bind the City through his unconstitutional actions even though those actions are not in the form of formal rules or regulations." *Id* (*citing Pembaur v. Cincinnati, supra,* at 479-481; ante, at 123 (plurality), at 139-140 (concurrence)). Additionally,

> [T]he real question in cases such as this is not "what constitutes City policy?" but rather "when should a City be liable for the acts of its agents?", the inclusion of single acts by high officials make sense, for those acts bind a municipality in a way that the misdeeds of low officials do not. Every act of a high official constitutes a kind of "statement" about how similar decisions will be carried out; the assumption is that the same decision would have been made, and would again be made, across a class of cases. If-correction would accomplish the same task, and until such time his action would

> have County-wide ramifications. Here, the Mayor, those working for him, and the agency heads are high-ranking officials; accordingly, we must assume that their actions have City-wide ramifications, both through their similar response to a like class of situations, and through the response of subordinates who follow their lead.

St. Louis v. Praprotnik, 485 U.S. 112, 170 (U.S. 1988).

> Likewise, a high municipal official can bind his principal (the city) for unauthorized actions because others -- both lower officials and members of the public with whom he deals -- perceive him as acting with broad authority and rely upon his actions in organizing their own behavior. The distinction between general agents and special agents has a firm "basis in the law." See ante, at 125, n. 2 (plurality).

St. Louis v. Praprotnik, 485 U.S. 112, 170 (U.S. 1988) Footnote 22).

> [F]or if the Court is willing to recognize the existence of municipal policy in a non-rule case as long as high enough officials engaged in a formal enough process, it should not deny the existence of such a policy merely because those same officials act "underground," as it were. It would be

a truly remarkable doctrine for this Court to recognize municipal liability in an employee discharge case when high officials are foolish enough to act through a "formal process," but not when similarly high officials attempt to avoid liability by acting on the pretext of budgetary concerns...

[W]e hold a municipality liable for the decisions of its high officials in large part because those decisions, by definition, would be applied across a class of cases...

[F]urthermore, just as we hold a municipality liable for discharging an employee without due process when its city council acts formally -- for a due process violation is precisely the type of constitutional tort that a city council might commit when it acts formally -- so too must we hold a municipality liable for discharging an employee in retaliation against his public speech when similarly high officials act informally -- for a first amendment retaliation tort is precisely the type of constitutional tort that high officials might commit when they act in concert and informally....

Whatever difficulties the Court may have with binding municipalities on the basis of the unconstitutional conduct of individuals, it should have no such

difficulties binding a city when many of its high officials -- including officials directly under the mayor, agency heads, and possibly the mayor himself -- cooperate to retaliate against a whistleblower for the exercise of his First Amendment rights...

[A] municipality, like any institution, can only act through the agency of human beings. By holding that isolated actions of high officials may give rise to municipal liability, *see, e.g., Owen v. City of Independence; Pembaur v. Cincinnati*, the Court has indicated that the mere status of City officials matters in determining whether the City may be held liable for the officials' actions. ... [P]ersonnel actions may be taken in response to an employee's protected speech by a number of high officials, none of whom possesses specific authority over "personnel" policy. Nevertheless, simply by virtue of their high rank, their actions may influence the actions of other municipal officials. It is that kind of influence that provides the common thread binding Monell and the later § 1983 municipal liability cases. In short, what the Court has characterized as "a new theory" is actually a way of understanding our precedents that will permit a judge to explain to a jury that "policy" means nothing if not "influence," and that while the isolated gunshot of an errant police officer would not influence

> his colleagues, *see Oklahoma City v. Tuttle*, adverse personnel actions taken by a City's highest officials in response to an employee's Civil Service Commission appeals and his public testimony would set an example for other, lower officials to follow.

St. Louis v. Praprotnik, 485 U.S. 112, 170-174 (U.S. 1988).
("Egregious attempts by local governments to insulate themselves from liability for unconstitutional policies are precluded" by allowing plaintiffs to prove that "a widespread practice" has been established by "'custom or usage' with the force of law" *See,* McMillian v. Monroe County, 520 U.S. 781, 796 (U.S. 1997)).

6. Defendants deprived Officer Hannan of his property privacy rights by releasing without consent, privilege or authority the Plaintiff's medical and mental health information and in violation of HIPPA and Section 7111 of the Pennsylvania Mental Health Procedures Act.

Officer Hannan alleged that (1) Captain Wiley disclosed the nature of his illness to the entire police department over police radio in a police incident report [6]and internal memorandum memorializing

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[6] The police report at issue does contained information of treatment for a perceived mental health issue. The report specifically listed the mental health issue and taking the

Officer Hannan's medical situation and treatment , (2) that the defendants acknowledged having been made aware of his medical situation from a phone conversation with John McNesby, FOP President and (3) that at least 38 police officers or police personnel told him that they had heard rumors and/or were made aware of his specific illness and having been treated at Friends Psychiatric Hospital. Weisman v. Buckingham Twp., 2005 U.S. Dist. LEXIS 11696 (E.D. Pa. June 14, 2005); *and see*, Deposition of Jeffrey Hannan App. II p.54-90. "Public disclosure and/or dissemination of an individual's medical records, in the absence of a compelling competing interest on the part of the state, constituted an unlawful violation of one's constitutionally protected right to privacy. Accepting the plaintiff's averments as true that one or more of the individual defendants made public and/or caused to be published over police radio and in a police report 75-48 that Officer Hannan was ill and/or suffering from a mental illness, then qualified immunity would not be available, given the clearly established law on this issue. Weisman v. Buckingham Twp., 2005 U.S. Dist. LEXIS 11696 (E.D. Pa. June 14, 2005).

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plaintiff to the hospital for treatment of the indicated mental health issue. As such, the report is a record containing mental health treatment information, which means the report qualifies as a protected record. Note worthy to support this conclusion is that police records are routinely withheld from others on the based of "privacy" in the personal information contained in the report. Incident Report dated 6/24/04 App. III p.20.

"Medical information . . . is entitled to privacy protection against disclosure." Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 113 (3d Cir. 1987). The type of privacy interest involving individual interest in avoiding disclosure of personal matters has been described as the right not to have intimate facts concerning one's life disclosed without one's consent. Kline v. Mansfield, 454 F. Supp. 2d 258 (E.D. Pa. 2006). Clearly, the disseminated information was in violation of Officer Hannan's privacy rights.

CONCLUSION

Officer Hannan does not elicit new claims on appeal: Officer Hannan was retaliated against for Petitioning Activity resulting in his being transferred and suspended: "to wit, a PBI hearing on misconduct charges ... and arbitration hearing for an illegal suspension and transfer.... *See*, Complaint, Count V. Retaliation page 5. Throughout the briefing in the matter *sub judice* and the documents in support thereof, it remains clear and the official time line speaks for itself that Officer Hannan's was transferred to the 18th district after Hannan's decision to demand a name clearing hearing rather than pleading guilty , which resulted in a unanimous finding of not guilty; and after Officer Hannan filed an arbitration grievance Officer Hannan was then given a 15 day suspension without pay. *See*, PBI Verdict Sheet dated 6/5/03 App. III p.11,Arbitration Grievance for the transfer filed 6/20/03 App. III p.13

and See, Notice of Suspension without pay: Served @ 12/11/03 App. III p.14-16.

Officer Hannan's has provided a chronological and detailed account for clarity of and understanding of his petitioning activity and the retaliation in which he had been subject as well as the Disciplinary scheme of the Police Department itself. The Retaliation claim, alleged states that Officer Hannan was twice retaliated against with a transfer and suspension. These represent the facts in evidence. Those basic facts which remain unchanged and are undisputed.

> "A district court's failure to consider an issue below does not necessarily preclude us from addressing it on appeal. However, it is only appropriate for us to do so 'when the factual record is developed and the issues provide purely legal questions, upon which an appellate court exercises plenary review.' In situations 'where the resolution of an issue requires the exercise of discretion or fact finding . . . , it is inappropriate and unwise for an appellate court to step in.'"

Anello v. Indian River Sch. Dist., 2009 U.S. App. LEXIS 27073, 4-5 (3d Cir. Del. Dec. 14, 2009) (*quoting* Hudson United Bank v. LiTenda Mortgage Corp., 142 F.3d 151, 159 (3d Cir. 1998)).

The defendants admit to the steps leading up to and including the transfer and suspension as well as the timing of the filing of both Arbitration

Grievances as well as referencing as "some lag time" the time between the transfer and suspension. *See*, Appellee's Response Brief, 12/18/09, p. 11. Officer Hannan's complaint clearly encompasses a claim for both the transfer and suspension. This is the big picture and it has not changed.

In the absence of "exceptional circumstances, an issue not raised in the district court will not be heard on appeal." Houghton v. American Guaranty Life Ins. Co., 692 F.2d 289, 294 (3d Cir. Pa. 1982)(citations omitted). Exceptional circumstances exist "when the public interest requires that the issue be heard or when manifest injustice would result from the failure to consider the new issue." Id. (*quoting* Altman v. Altman, 653 F.2d 755, 758 (3d Cir. 1981)). The rule against considering issues not raised before the district court is considered essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues and in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. Harris v. City of Philadelphia, 35 F.3d 840 (3d Cir. Pa. 1994). Here, to permit the defendants to slip under the proverbial radar for their actions would amount to manifest injustice. No harm or surprise results to the defendants as a result of finding manifest injustice, rather, only accountability for their repeated retaliatory actions as continually proclaimed by Officer Hannan. Officer Hannan's constitutional retaliation claim is too significant to be allowed to go uncorrected and/or or

not included and that doing so creates a manifest injustice.

The only egregiousness would result from its preclusion from a jury and no cessation of this on going activity. Upon balancing "the possible hardships imposed on the respective parties," it is without question that all hardship would fall to Officer Hannan and the entire Philadelphia Police Department and none to the Defendants. Lentz v. Mason, 32 F. Supp. 2d 733, 752 (D.N.J. 1999)(*quoting* Gorlikowski v. Tolbert, 52 F.3d 1439, 1444 (7th Cir. 1995)).

For all the foregoing reasons, petitioner respectfully request that the Supreme Court grant review of this matter.

/s/ Marissa J. Brumbach, Esquire
3406 Capri Court
Philadelphia. PA 19145
215-605-0505

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
CIVIL NO. 05-2863

JEFFERY HANNAN
Plaintiff,
vs.

CITY OF PHILADELPHIA, et al.,

Defendants.

RUFE, J.
August 22, 2007

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the Defendants' Motion for Summary Judgment. After reviewing the Defendants' Motion [Doc. # 26], the Plaintiff's Brief in Opposition thereto [Doc. # 30], the Defendants' Reply Brief [Doc. # 32], and the Plaintiff's Sur-Reply Brief [Doc. # 33], the Court will GRANT IN PART and DENY IN PART the Defendants' Motion, for the reasons stated below.

BACKGROUND
A. Introduction

In this civil-rights case filed under *42 U.S.C. § 1983*, Officer Jeffery Hannan of the Philadelphia Police Department ("Department") is suing the City of Philadelphia ("City") and three other Department officials--Commissioner Sylvester Johnson, Inspector William Blackburn, and Karen Byrd, seeking damages arising out of his transfer and suspension in 2003. He argues that by transferring him from the elite Narcotics Strike Force ("Strike Force") to the 18th District, a patrol division, and then later suspending him for 15 days without pay, the City and the Department officials violated several of his constitutional and statutory rights.

At its essence, this case arises from Hannan's perception that Department Commissioner Sylvester Johnson disciplined him on illegitimate grounds. Although Commissioner Johnson claims that he disciplined Hannan for conduct unbecoming of a police officer, Hannan argues that he was transferred and suspended as an act of retaliatory and racial animus. Because this is a motion for summary judgment, the Court views the factual record in the light most favorable to Hannan, the non-moving party. [1]

B. Facts

Officer Jeffery Hannan has been an officer with the Department since March 1, 1993. Hannan began his police service as a patrol officer in the 14th District, where he eventually became a member of

the Narcotics Enforcement Team. In 1998, Hannan approached Commissioner Johnson (then Deputy Commissioner), and expressed interest in an appointment to [*3] the Strike Force, an elite unit that operates city-wide rather than in a single patrol district. Commissioner Johnson appointed Hannan to the Strike Force in March of 1998, where he excelled. He became a speaker at judicial conferences, where he would educate judges on the illicit narcotics industry. In 2000, he also became an instructor at Top Gun, an annual narcotics-enforcement training program at the National Guard Training Center, a military base in Fort Indiantown Gap, Pennsylvania.

The incident that underlies this litigation occurred while Hannan was serving as a Top Gun instructor in October 2002. One evening during the training program, before a day off, Hannan and several other off-duty instructors went drinking at a local bar, [2] later returning to "a party back at the rooms in the guy's [sic] building." [3] Hannan arrived at the party with Janine Miller, another Top Gun instructor who at the time was employed by the Office of the Pennsylvania Attorney General. Because Miller did not want to be "the only girl here," [4] Hannan agreed to walk with Miller back to the women's dormitory to invite another female officer named Donna to come along. While Donna was getting ready, Hannan and Miller stood in the common area, and Miller stooped down to get some drinks out of the refrigerator.

Hannan stated that Miller "was teasing [him] throughout the night about something she had of mine." [5] Upon realizing that his cell phone was missing, Hannan went into Miller's doorway, where he "fell over her." [6] Then, they "were rolling on the ground." [7] Hannan said that when he told Miller that he needed the cell phone to call his wife, Miller seemed "a little irate" upon learning that he was married. [8] Then, Donna walked into the room. Seeing them on the floor, she said "do you guys want me to leave?" [9] Hannan and Miller said "no," then got up, and went with Donna back to the party in the men's building, where they stayed for about an hour. Hannan maintains that "[e]verybody was laughing and having a good time." [10]

When Hannan left the party, he went directly to his room. Upon realizing that he still did not have his cell phone, he went back to the party to look for it. Realizing that "the girls had left," he "went over to their building, knocked on the door, [and said] somebody give me my phone." [11] When no one let Hannan in, he returned to his room and went to bed.

The next day, on his day off, Hannan received word at about 2:30 p.m. that the Colonel in charge of the military base wanted to speak with him. Hannan then went to the Colonel's office, where the Colonel told him that Janine Miller had filed a police report, claiming that Hannan had sexually assaulted her. The Colonel then told Hannan that he insisted that both he and Miller leave the military base.

Miller's account of the events, documented in a police report filed with the Fort Indiantown Gap Police Force, alleged:

> [On the night in question], someone from the Top Gun Academy came into [Miller's] room and tried to assault her. Janene [sic] Miller stated that while she was getting something out of her refrigerator, someone walked into her room and grabbed her from behind. The person then pinned her onto the ground and started to rub their hands up and down her body. She identified this person as Jeff, (someone that was in her class). She told him to get off of her, he refused. [*6] She immediately tried pushing him away from her, but was unsuccessful. Donna M. O'lonnell [sic] (7-18-65) entered the room and noticed that Jeff was on top of her. Donna asked what was going [sic] on? Janene [sic] Miller yelled for help, so Donna grabbed Jeff's shoulder and pulled him off of her. [12]

On that same day, after Hannan and Miller left Fort Indiantown Gap, Commissioner Johnson received a phone call from the Colonel. Commissioner Johnson stated in his deposition

that the Colonel "told me that . . . the person, who we had sent up there to teach a class, was intoxicated and he tried to rape one of the women up there." [13] Commissioner Johnson then told Deputy Commissioner of Operations Robert Mitchell that there "maybe a possible rape" and that he wanted it investigated. [14]

When Hannan returned to duty on the Strike Force in Philadelphia, his supervisor, Captain William S. Broadbent, Jr., also requested that the Department's Internal Affairs Division open an investigation into the events at Fort Indiantown Gap. Internal Affairs then assigned Captain Broadbent to conduct the investigation. Defendant William Blackburn, Chief Inspector of the Strike Force, also became involved in the investigation.

When Broadbent completed his investigation, he recommended that no discipline be imposed against Hannan. Broadbent then sent the investigation packet, along with his recommendation, to Commissioner Johnson. According to Commissioner Johnson, Mitchell later recommended that Hannan be fired through Commissioner's Direct Action ("CDA"). [15] Mitchell made this recommendation after both he and Commissioner Johnson had reviewed Captain Broadbent's investigation. [16]

Broadbent also sent the packet to

Captain Deborah Mateffy of the Charging Unit. The Charging Unit--which is a component of the Police Board of Inquiry ("PBI")--is the body that files formal disciplinary charges against members of the Department. Captain Mateffy, whose duty it is to review cases and decide whether to file disciplinary charges, reviewed Captain Broadbent's investigation. Captain Mateffy determined that there was insufficient justification for charges against Hannan.

Despite her determination that no charges should be filed with the PBI, Captain Mateffy "was instructed from 'someone of higher rank'" to file the charges. [17] The charges accused Hannan of conduct unbecoming of a police officer. On March 18, 2003, Captain Broadbent presented Hannan with the charges, and explained that Hannan had the choice either to sign the charges "guilty" or "not guilty," or else agree to a transfer out of the Strike Force. [18] Hannan signed the charges "not guilty." [19]

Pursuant to Hannan's "not guilty" claim, the PBI then held a formal proceeding before a three-member panel on June 5, 2003, to determine whether Hannan's conduct at Top Gun constituted conduct unbecoming of an officer. That same day, the PBI panel unanimously voted to find Hannan not guilty. [20] In a memorandum to Commissioner Johnson dated June 6, 2003, the PBI informed the

Commissioner that the panel "found the testimony of P.O. Hannan to be more credible than that of the complainant, Janene [sic] Miller, and other witnesses called on her behalf." [21] Despite the PBI's conclusions, the Commissioner decided that Hannan "should be disciplined, no matter what the trial board said." [22] Shortly thereafter, Commissioner Johnson transferred Hannan from the Strike Force to the 18th District. [23] Several months later, he issued Hannan a 15-day suspension without pay. The transfer and suspension harmed Hannan both financially and emotionally. Financially, Hannan's income level dropped substantially. He lost opportunities to work significant overtime as a member of the Strike Force. And because the suspension and transfer tended to corroborate his undeserved reputation as a "groper," [24] and took away the elite position in which he had excelled, Hannan "suffered depressions, spells of crying and anxiety," which ultimately resulted in outpatient medical treatment at Friends Hospital. [25]

Hannan, maintaining his innocence throughout all these events, grieved his discipline through the procedures of the collective-bargaining agreement between the police union and the City. This process culminated in arbitration under the auspices of

the American Arbitration Association. On May 17, 2005, the arbitrator, finding that the Commissioner had transferred and suspended Hannan without just cause, concluded that the City had violated the terms of the collective-bargaining agreement. [26] The arbitrator rescinded the transfer and suspension, and awarded Hannan damages to compensate him for all wages, benefits, and overtime lost during his absence from the Strike Force. [27] The arbitrator also ordered the City to expunge all of the records of the wrongful discipline. [28]

Hannan filed this suit shortly thereafter, seeking damages for violation of his Constitutional and statutory rights. Hannan has named the City, Commissioner Johnson, Inspector Blackburn, and Karen Byrd (the Commissioner's secretary) as Defendants. Hannan is Caucasian and the individual Defendants are all African-American. Hannan asserts claims under § 1983 for First Amendment retaliation, depriving him of property and liberty without due process of law, violating his right to equal protection under the law, and for constitutional violations arising out of official City policy. Hannan further asserts claims for conspiracy to violate his civil rights under *42 U.S.C. § 1985(3)*, violation of the Pennsylvania Mental Health Procedures Act, and for intentional infliction of emotional

distress. This Court has subject-matter jurisdiction under *28 U.S.C. § 1331* and *28 U.S.C. § 1343*, and supplemental jurisdiction over the state-law claims under *28 U.S.C. § 1367*.

DISCUSSION

A. Legal Standard

Under Federal Rule of Civil Procedure 56(c), the Court should grant summary judgment to the moving party if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [29] In making this determination, the Court "'must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor.'" [30]

Although this standard of review is designed to give the nonmovant the benefit of every doubt, he must still produce enough evidence to persuade a reasonable jury to find for him at trial. Specifically, "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof

at trial." [31]

B. Review of Hannan's Claims

1. First Amendment Retaliation

Under the First Amendment, "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." [32] This prohibition is binding on state governmental bodies as well. [33] Hannan argues that by signing the charges "not guilty," thus triggering a hearing before the PBI, that he was in effect requesting a name-clearing hearing, which amounts to a petition to the City for redress of his smeared reputation. Hannan claims that by transferring and later suspending him, Commissioner Johnson retaliated against him for exercising his First Amendment rights.

Under the law of the Third Circuit, "[t]o state a First Amendment retaliation claim, a plaintiff must allege two things: (1) that the activity in question is protected by the First Amendment, and (2) that the protected activity was a substantial factor in the alleged retaliatory action." [34] As to the first element, Defendants argue that Hannan signing the charges did not amount to an act protected by the First Amendment. As to the second element, Defendants argue that Hannan has not set forth sufficient evidence such that a jury could reasonably find a causal link between Hannan's

request for a name-clearing hearing and the subsequent discipline.

a. Protected Activity

Turning to the first element, Defendants argue that Hannan's "not guilty" signature on the charges is not protected conduct, because it does not constitute a petition to the government for a redress of grievances. Pointing out that Commissioner Johnson has the ultimate say in all police disciplinary matters and that the PBI verdict does not bind the Commissioner, Defendants argue that a favorable finding at the PBI does not actually have the power to redress Hannan's grievance. Indeed, it is true that the [*14] PBI result did not fully vindicate Hannan, since the Commissioner went on to discipline him despite the PBI's recommendation against doing so. Nonetheless, the Court concludes that Hannan's choice to opt for a non-binding name-clearing hearing constituted a "petition" under the First Amendment.

The Court notes preliminarily that this is a question of law. [35] The Supreme Court has defined acts under the Petition Clause very broadly, and indeed has held that "the right to petition extends to all departments of the government." [36] Thus, citizens have the constitutional right to seek redress from a legislature, [37] from executive officials, [38] and

through the judicial process, [39] without fear of reprisal by the government. Additionally, the Third Circuit has given broad scope to the Petition Clause in the context of employee grievances against an employer.

In *San Filippo v. Bongiovanni*, [40] the Third Circuit held that a fired college professor's lawsuits and employee grievances against his university employer could be protected under the Petition Clause, even though they did not address matters of public concern. In so holding, the Third Circuit explicitly parted ways with the other circuit courts to have addressed the question, which have all refused to recognize a private employee grievance against a government employer as protected activity under the Petition Clause. [41] The San Filippo court stated that "when government--federal or state--formally adopts a mechanism for redress of those grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious 'petition' invoking that mechanism may be disciplined for such invocation by the very [*16] government that . . . has given the particular mechanism its constitutional imprimatur." [42]

Although the Defendants argue that Hannan's insistence on a PBI hearing is not

such a "formal mechanism," because it is not binding on Commissioner Johnson, the Court nonetheless believes that the law in this Circuit informs the Court's decision that Hannan was attempting to vindicate the same First Amendment values implicated by a more formal petition for redress. The Supreme Court has stated, in a decision interpreting the Petition Clause, that "[t]he first amendment interests involved in private litigation" include "compensation for violated rights and interests, the psychological benefits of vindication, [and] public airing of disputed facts." [43] Although the PBI hearing did not have the power to compensate Hannan for any violated rights, Hannan has specifically stated that he requested the PBI hearing to clear his name--which implicates both of the other First Amendment values that the Supreme Court recognized are inherent in private litigation. Thus, based on the Third Circuit's broadened scope of the Petition Clause in San Filippo to include private employee grievances, and recognizing Hannan's request for a PBI hearing as implicating First Amendment values recognized by the Supreme Court, the Court concludes that Hannan's request for a PBI hearing as a name-clearing device is protected by the Petition Clause.

b. Substantial Factor

Turning to the second element of the retaliation claim, Defendants argue that a rational jury could not reasonably find that his request for a name-clearing hearing was a substantial factor in the discipline--i.e., that his request for a hearing caused Commissioner Johnson to discipline him. In support, Defendants argue only that causation cannot be inferred simply by the temporal proximity between the protected act and the subsequent discipline. In other words, the fact that Commissioner Johnson meted out punishment shortly after the PBI verdict is alone not enough to prove causation.

It is true that under Third Circuit precedent, timing between protected activity and discipline may not alone be enough to permit an inference of retaliation. 44 Nonetheless, the Third Circuit looks to "the context of the record as a whole" [45] to determine whether a jury could find the necessary causal link to prove retaliation. [46] Thus, this Court must look at the totality of the circumstances to determine whether a rational jury could reasonably find that Hannan's request for a name-clearing hearing played a substantial role in his ultimate discipline.

For example, Hannan testified in his deposition that despite Captain Mateffy's recommendation that Hannan not be charged at

the PBI, the Department leadership insisted that Hannan be charged, unless he agreed to be transferred to a patrol district. [47] Hannan believed that he could choose a district for transfer, or else face the charges. [48] After the PBI verdict, however, Commissioner Johnson transferred Hannan to the 18th District--further from his home geographically than any other district. 49 Moreover, three months later, on September 18, 2003, Commissioner Johnson executed a Notice of Suspension, suspending Hannan from duty without pay for 15 days. [50] Therefore, not only did Hannan receive punishment despite the not-guilty PBI verdict, but he received a more severe punishment.

Furthermore, a neutral arbitrator later determined that Commissioner Johnson had disciplined Hannan without just cause. While this does not directly tend to prove a causal link, it casts doubt on the Commissioner's purported reason for disciplining him, thus suggesting that there must be another reason, e.g., retaliation. This evidence, while not conclusive, is sufficiently suggestive of retaliatory animus to allow a jury to reasonably conclude that Commissioner Johnson meted out discipline against Hannan as an act of retaliation.

Defendants point out that an employer "may defeat the employee's [retaliation] claim

by demonstrating that the same adverse action would have taken place in the absence of the protected conduct." [51] Accordingly, they argue that Hannan cannot prove causation, because Commissioner Johnson would have disciplined Hannan had he never requested a PBI hearing. The Defendants cite Commissioner Johnson's deposition testimony, in which he states:

> The fact that he was up there as an instructor for the Philadelphia Police Department, the fact that he was in that room by his own admission, that he had been drinking on the form of being intoxicated, the fact that he's in the women's dormitory at that time of night, the fact that he winds up on the floor looking for his cell phone or not, I thought he should be disciplined. [52]

In other words, if Commissioner Johnson was planning to discipline Hannan, no matter what the PBI said, then there cannot have been any retaliatory motive.

While this might in fact be true, the Court would have to impermissibly credit the deposition testimony of Commissioner Johnson as true at the summary-judgment stage--a stage at which the facts are to be viewed in the light most favorable to the non-moving party. [53] Indeed, this credibility determination is all the more important in light of the fact that Defendants have not pointed to any

corroborating evidence to support Johnson's testimony--for example, an internal Department memorandum drafted before the PBI hearing--that could document the prospective punishment to be imposed. Moreover, Commissioner Johnson did not explain in his deposition the reason for imposing a harsher discipline (transfer to 18th District, plus 3-week suspension) after the PBI hearing, as compared to the discipline originally proposed (transfer to a patrol district of Hannan's choice).

Therefore, the Court is satisfied that based on the totality of the circumstances, a rational jury could conclude that the Commissioner retaliated against Hannan for insisting on a name-clearing hearing before the PBI. The motion for summary judgment, therefore, will be denied on this claim with respect to Commissioner Johnson.

Turning to the evidence of retaliation on the part of Defendant Karen Byrd, there is insufficient evidence to present retaliation claims against her to the jury. In his Complaint, Hannan alleged that Byrd was "the person that actually signed the 15-day suspension notice." [54] He also alleges that she "signed the name of Sylvester Johnson, doing so with actual or apparent authority of Defendant Johnson." [55] There is no record evidence, however, that Byrd did anything other than a ministerial act in signing the suspension form. Because no evidence tends to prove that Byrd herself had a retaliatory motive in signing the Commissioner's signature on the suspension,

she is entitled to judgment as a matter of law on this claim.

As for Inspector Blackburn, there is similarly a lack of evidence to prove that he engaged in retaliation. According to the Complaint, Inspector Blackburn is "in Plaintiff's chain-of-command," [56] and Hannan suggests that Blackburn manipulated the internal charging process to make sure that Hannan was charged, despite Captain Mateffy's decision not to file charges with the PBI. However, there is no evidence that Blackburn participated in the ultimate transfer and suspension after Hannan requested his name-clearing hearing. Therefore, because retaliation requires a showing of a causal link between protected activity and adverse action, there is insufficient evidence for a jury to find that Inspector Blackburn is liable for First Amendment retaliation. Thus, Inspector Blackburn is entitled to judgment as a matter of law on this claim.

2. Due Process

Under the Fourteenth Amendment, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." [57] Hannan argues that because Commissioner Johnson suspended and transferred him against the unanimous recommendation of the PBI, that he was deprived of his liberty and property without due process of law.

The Third Circuit has held that "[t]o state a claim under § 1983 for deprivation of procedural due process rights, a plaintiff must

allege that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of 'life, liberty, or property,' and (2) the procedures available to him did not provide 'due process of law.'" [58] Hannan posits that his job in the Strike Force constituted a property interest, and that his reputation as a police officer constitutes a liberty interest, both of which he was deprived of without due process.

Assuming arguendo that Hannan's transfer and suspension deprived him of liberty and property interests, [59] Hannan has not presented evidence for a reasonable jury to conclude that those deprivations occurred without due process of law. The Third Circuit has stated that in a government employee's employment-termination case, due process provides that "'the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.'" [60] In other words, "due process requires some kind of a hearing prior to the discharge of an employee who has a constitutionally protected [*25] property interest in his employment." [61] Hannan does not dispute that his hearing before the PBI amounted to a valid pre-deprivation hearing--on the other hand, he argues that Commissioner Johnson, by not adhering to the PBI's recommendation, denied him due process.

Hannan makes much of the idea that by disciplining him despite the PBI's findings,

Commissioner Johnson violated due process by acting arbitrarily. [*26] He asserts that there are no documented cases of an officer from the Department being acquitted before the PBI, yet still disciplined by the Commissioner afterward. The Court interprets this as an argument that Commissioner Johnson was not an impartial decisionmaker.

"[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." [62] The Third Circuit, however, has also held that neutral post-deprivation proceedings can cure any such bias on the part of the decisionmaker. In *McDaniels v. Flick*, [63] the Third Circuit held that a fired college professor could not demonstrate a due-process violation--even if the decision to fire was the product of a sham proceeding--until he exhausted his post-deprivation remedies under a collective-bargaining agreement. The court, reviewing similar decisions from other circuits, concluded that in the employment-termination context, a due-process violation "'is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process.'" [64] Accordingly, the court held that "a discharged employee cannot claim in federal court that he has been denied due process because [*27] his pretermination hearing was held by a biased individual where he has not taken advantage of his right to a post-deprivation hearing before an impartial tribunal that can rectify any possible wrong committed by the initial decisionmaker." [65]

Here, Hannan availed himself of such post-deprivation proceedings. Therefore, even if Hannan's pre-deprivation process was tainted by an impartial decisionmaker, he received a post-deprivation hearing designed to remedy that defect. The Third Circuit has held that a grievance mechanism in a collective-bargaining agreement--such as the one that Hannan used in this case--can adequately substitute for state-provided post-termination proceedings, provided that those proceedings comply with due process. [66] And Hannan does not argue that the grievance proceedings did not provide due process--in fact, he was put back into his rightful position after the arbitration. Therefore, under the Third Circuit's precedents, the Court finds no basis [*28] upon which a reasonable jury could find that he was denied of his due-process rights.

3. Equal Protection

Under the Fourteenth Amendment, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." [67] Hannan's equal-protection claims (one of which he styles as a claim for "race discrimination,") are based on the theory that Commissioner Johnson, who is African-American, intentionally treated Hannan more harshly than other similarly-situated African-American officers, without any rational basis. Although Hannan raises three theories of recovery under the equal-protection clause, [68] the only plausible one is that Hannan falls under the "class of one" doctrine announced by the Supreme Court in

Village of Willowbrook v. Olech. [69] Under the class-of-one theory, a plaintiff can establish a violation of the equal-protection guarantee if he can show that "(1) the defendant treated him differently than others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." [70]

Second, Hannan also now raises, for the first time, an equal-protection claim under the Pennsylvania Constitution. Hannan did not include such a claim in his Amended Complaint, and therefore it is unfair to the Defendants to have them defend the claim now, after discovery is complete and their respective cases have been prepared. Thus, the Court will not entertain this claim. See *Satterfield v. Borough of Schuylkill Haven*, 12 F. Supp. 2d 423, 433 (E.D. Pa. 1998) (dismissing claim raised for the first time in a summary-judgment brief, because "the Plaintiff failed to notify the opposing parties and the court of such a claim on a timely basis").

The Court concludes that Hannan has not produced a quantum of evidence that could persuade a reasonable jury that he was intentionally treated any harsher than his colleagues. In his Opposition Brief, Hannan states that he "produced the names of black NSF officers who engaged in misconduct, such as stealing drug buy or confiscated drug money, but these persons were allowed to return to NSF following resolution of the alleged

misconduct." [71] Hannan then cites to his Statement of Undisputed Facts, which provides:

> Hannan is the only white officer to have either been alleged or actually found to have engaged in misconduct and was removed from NSF and kept from returning to NSF. However, there are black male and female officers who have been accused or actually committed misconduct, including stealing a safe from the NSF building, which safe containing [] 8900 in confiscated drug money, and all of these officers were removed from NSF but later returned. [72]

This paragraph in the Statement of Undisputed Facts then cites fifteen pages of Hannan's deposition testimony. [73]

After reviewing the cited pages of Hannan's deposition, the Court finds only one reference to similarly-situated officers. According to the testimony, Officer Brenda Jones and one of her colleagues, both African-American females, were suspended from the Strike Force after making a racial slur to a Caucasian waitress. [74] The testimony suggests that they were later reinstated to the Strike Force without the necessity of going through the grievance process. [75] In this section of the deposition, these are the only two officers specifically mentioned.

Hannan also explains his theory that the top leadership in the Department, which he claims is mostly African-American, favors putting other black

officers in the Strike Force, ahead of more qualified Caucasian officers, although he provides no supporting details. [76] He then states: I actually wanted to--I wanted all the PBIs and the decisions since Johnson's been Commissioner. I requested that through my lawyer. I--I had asked Captain [Mateffy of the Charging Unit] personally if she had records of that. And she told me, yes, they're there. So, we can actually pull, which I thought would have been a great idea, which we have some in the Seitzer Green report. But if we broke each one down, compared to race, gender, I think it would be shocking.

This testimony, if presented at trial, is not sufficient to persuade a reasonable jury that Hannan was purposefully treated differently than his fellow officers. Again, the only specific evidence is the Brenda Jones anecdote, unsupported by any documentary evidence or corroborating deposition testimony. The other support is merely Hannan's personal "hunch" that he is treated more harshly because he is white. The Court is not obligated to sift through the entire record to see if Hannan has produced evidence supporting this claim. The only [77] evidence that he cites in his briefs could not convince a rational trier of fact that he was intentionally treated differently without a rational basis. Thus, the Defendants are entitled to judgment as a matter of law on this claim as well.

4. Qualified Immunity

Defendants raise the affirmative defense of

qualified immunity in their Answer. [78] The doctrine of qualified immunity "is intended to shield government officials performing discretionary functions, including police officers, 'from liability [for] civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" [79] Because only one constitutional claim will remain after the Court's present ruling-namely a First Amendment--retaliation claim against Commissioner Johnson--the Court will confine its qualified-immunity analysis to that claim.

Under Supreme Court precedent, the question of whether an officer is shielded by qualified immunity is a two-part test. First, the Court asks, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" [80] Second, the Court asks "whether the right was clearly established," that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." [81]

Applying this two-part test, the Court notes that the first part of the Saucier test is satisfied. The Court has already determined in its summary-judgment analysis that a reading of the record in the light most favorable to Hannan supports a claim of First Amendment retaliation against the Commissioner. Turning to the second prong of Saucier, however, the Court views the question of

whether Commissioner Johnson's conduct was objectively reasonable under the circumstances as dependent on historical facts that must be resolved at trial.

The Supreme Court has recognized that determination of the objective reasonableness of an officer's conduct, while often a question of law for the reviewing court, [82] sometimes requires the resolution of facts by a jury. [83] The reasonableness of certain constitutional violations can frequently be determined by the Court--for example, with excessive-force claims brought under the Fourth Amendment. In those cases, "[t]he test of reasonableness . . . is whether under the totality of the circumstances, the officers' actions are objectively reasonable in light of the facts and circumstances [*35] confronting them, without regard to their underlying intent or motivations." 84 But in cases where the officer's motive is a question of historical fact that is inseparable from merits of the underlying claim, the courts have recognized the appropriateness of allowing a jury to decide whether the officer's conduct was objectively reasonable. [85] Indeed, in any case where "a genuine issue exists as to any material fact [with respect to the underlying constitutional claim], a decision on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis." [86]

Here, the Court has already determined that

Commissioner Johnson's state of mind is a genuine issue of material fact for the jury. The Court also concludes, therefore, that for the purposes of determining whether Johnson is qualifiedly immune, the question of whether his decision to discipline Hannan after the PBI hearing is objectively reasonable is inseparable from the question about his motivation--a matter of historical fact. Thus, the Court will deny the Commissioner's motion for summary judgment on the defense of qualified immunity. The Commissioner will have the opportunity at trial to persuade the jury that his conduct was objectively reasonable.

5. Municipal Liability of Defendant City

In Count I of his Complaint, Hannan names the City as a Defendant, alleging municipal liability for the actions of its officers under the well-known rule of Monell v. Department of Social Services. [87] In the words of the Third Circuit, under Monell, "a municipality can be sued directly under § 1983 if it is alleged to have caused a constitutional tort through a policy, ordinance, regulation or officially adopted decision that has been promulgated by the municipality's officers." [88]

Additionally, liability attaches "for a municipality's constitutional violations resulting from governmental custom even though such custom has not been formally approved via the official decision making channels." [89]

Here, Hannan claims that Commissioner

Johnson's act of transferring him and later suspending him constitutes an unconstitutional policy of the City, such that the City should be liable to him. Though seemingly counterintuitive, it is nonetheless true that even a single act of a high-ranking public official can constitute an official policy of a municipality, provided that the public official is "responsible for establishing final government policy respecting such activity[.]" [90] Accordingly, Hannan contends, because Commissioner Johnson has final policymaking authority, the transfer and suspension are policy decisions attributable to the City.

Hannan's arguments that Commissioner Johnson has such final policymaking authority, however, are unpersuasive. Under Supreme Court precedent, "whether a particular official has 'final policymaking authority' is a question of state law." [91] Therefore, Hannan's burden of production to survive summary judgment on this claim must include at a minimum some state or municipal legal authority describing the source and nature of Commissioner Johnson's disciplinary powers. [92] Hanna simply points to Commissioner Johnson's deposition testimony, in which he admitted that he is a policymaker. [93] Commissioner Johnson's statements, however, are not a source of law. This Court will not decide whether the Commissioner has final policymaking authority with respect to disciplinary matters based solely on his deposition testimony. Hannan has not supplied the Court with [*39] any

other authority describing the Commissioner's powers.

Moreover, based on the undisputed facts, it is clear that Commissioner Johnson's discretionary decision to transfer and suspend Hannan were subject to review by an arbitrator. In fact, the arbitrator (empowered by a collective-bargaining agreement between the City and the police union) reversed the Commissioner's disciplinary actions. The Third Circuit has held that "if a municipal employee's decision is subject to review, even discretionary review, it is not final and that employee is therefore not a policymaker for purposes of imposing municipal liability under § 1983." [94] Applying this rule, the Court concludes that as a matter of law, Commissioner Johnson's discretionary decision to transfer and suspend Johnson cannot be [*40] the basis for municipal liability against the City. [95] Therefore, the City is entitled to judgment as a matter of law on Hannan's Monell claim.

6. Claim under 42 U.S.C. § 1985(3)

> To establish a violation of 42 U.S.C. § 1985(3), a plaintiff must show:
> (1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or

> property or the deprivation of any right or privilege of a citizen of the United States. [96]

The chain of events that purportedly establishes this claim does not reveal any racial or class-based discriminatory animus. Hannan's evidence simply boils down to one fact: that he is Caucasian, and the top brass in the Department is African-American.

In his brief, he spends three pages alluding to conversations that occurred among Commissioner Johnson, Inspector Blackburn, and Deputy Commissioner Mitchell, after the Fort Indiantown Gap incident. [97] Hanna also refers to Defendant Byrd, whose only involvement in the events is her signature on Hannan's suspension order. Notably, Hannan does not explain how these conversations, taken as a whole, demonstrate racial or class-based discriminatory animus. No matter how strong Hannan's "hunch" may be that he was a target based on his race, he may not manufacture a jury-triable issue based merely on the fact that African-American decisionmakers may have decided to discipline him behind closed doors. Therefore, the Court will enter summary judgment in favor of Defendants on this claim as well.

7. State-law claims

a. Pennsylvania Mental Health Procedures Act

In his Complaint, Hannan alleges that he sought medical care for emotional distress arising out of his transfer and suspension, and that "he was also ordered to enter a hospital for mental treatment

for the situational depression." [98] Hannan also alleges that the Defendants "depriv[ed him of his] property privacy rights by releasing without consent, privilege or authority the Plaintiff's medical and mental health information and in violation of HIPPA [sic]." [99]

In the summary-judgment briefs, however, the parties do not address HIPAA, or any other federal statute. Rather, they discuss Section 7111 of the Pennsylvania Mental Health Procedures Act. [100] That statute provides that "[a]ll documents concerning persons in treatment shall be kept confidential and, without the person's written consent, may not be released or their contents disclosed to anyone except . . . [list of four exceptions]." [101] Thus, Hannan, with the Defendant's implied consent, appears to have converted this claim into a claim for relief under a Pennsylvania statute.

Frankly, the arguments surrounding this claim for relief are beset with the same problems that the Court has struggled with throughout the resolution of this motion for summary judgment, but to a greater degree. The Plaintiff has not clearly established the facts relevant to this claim. Neither Plaintiff nor Defendants have explained the governing law to the Court, nor how it applies to the parties in this case. The Court is left with the text of a statute, an uncited police report (which the Court found only after sifting through an exhibit binder),

the handwritten text of which is only partially legible, [102] and legal arguments that ramble from the Supreme Court's surveillance jurisprudence under the Fourth Amendment, to the meaning of privacy under Roe v. Wade. [103]

Hannan does not precisely describe the course of events, and the law's applicability to those facts to establish liability on the part of the Defendants. Hannan does not state who wrote the police report, who released it, or who saw it. Therefore, the Court finds this cause of action unintelligible, and unfit for resolution by a jury. The court will enter judgment as a matter of law in favor of Defendants on this claim.

b. Intentional Infliction of Emotional Distress

Lastly, Hannan seeks damages for intentional infliction of emotional distress. Under Pennsylvania law,"'[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.'" [104] The Pennsylvania courts have been reluctant to allow recovery under this theory of relief. One court has noted, "the conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." [105] Additionally, "it has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to

inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort." [106]

The Pennsylvania Supreme Court's decision in Hoy v. Angelone summarizes this area of the law as follows:

> Cases which have found a sufficient basis for a cause of action of intentional infliction of emotional distress have had presented only the most egregious conduct. See e.g., *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970) (defendant, after striking and killing plaintiff's son with automobile, and after failing to notify authorities or seek medical assistance, buried body in a field where discovered two months later and returned to parents (recognizing but not adopting section 46)); *Banyas v. Lower Bucks Hospital*, 293 Pa. Super. 122, 437 A.2d 1236 (1981) (defendants intentionally fabricated records to suggest that plaintiff had killed a third party which led to plaintiff being indicted for homicide); *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (defendant's team physician released

> to press information that plaintiff was suffering from fatal disease, when physician knew such information was false). [107]

Based on this, the Court concludes that Hannan cannot, as a matter of law, prevail on a claim for intentional infliction of emotional distress. Even if he persuades the jury that Commissioner Johnson disciplined him more severely for exercising his First Amendment rights, the Court does not consider this to be in the category of "the most egregious conduct." Again, the Pennsylvania courts have limited this tort to cover "only the most clearly desperate and ultra extreme conduct." [108] The three cases described by the Pennsylvania Supreme Court in Hoy are in an altogether different category than the facts presented here. Secretly burying a dead body in a field without notifiying the authorities, or intentionally causing an innocent person to be criminally indicted, are of a degree of outrageousness that far exceeds the facts of this case. Whereas retaliation in the workplace is unlawful and potentially harmful, not all claims of retaliation surpass the bounds of the everyday. This Court finds it highly unlikely that the Pennsylvania Supreme Court would find these facts sufficiently extreme and outrageous to support liability under this theory. Therefore, the Court is unwilling to stretch the bounds of established Pennsylvania law by allowing this claim to be presented to the

[*47] jury. Accordingly, the Court will enter summary judgment in favor of the Defendants on this claim as well.

CONCLUSION

For the foregoing reasons, the Court will enter summary judgment in favor of Defendants Blackburn, Byrd, and the City of Philadelphia as to all Counts of Hannan's Complaint. The Court will deny Commissioner Johnson's Motion for Summary Judgment as to Count V (Retaliation), and grant the Commissioner's Motion for Summary Judgment on all other counts.

An appropriate Order follows.

ORDER

AND NOW, this 22nd day of August 2007, upon consideration of the Defendants' Motion for Summary Judgment [Doc. # 26], the Plaintiff's Brief in Opposition thereto [Doc. # 30], the Defendants' Reply Brief [Doc. # 32], and the Plaintiff's Sur-reply Brief [Doc. # 33], and the applicable law, it is hereby

ORDERED, that the Defendants' Motion for Summary Judgment [Doc. # 26] is GRANTED IN PART and DENIED IN PART; it is further

ORDERED, that Judgment is ENTERED in favor of

Defendants Blackburn, Byrd, and the City of Philadelphia, on all counts of the Plaintiff's Complaint; it is further

ORDERED, that Judgment is ENTERED in favor of Defendant Commissioner Johnson on Counts I, II, III, IV, and VI of the Complaint ONLY; and it is further

ORDERED, that Commissioner Johnson's Motion for Summary Judgment is DENIED with respect to Count V of Plaintiff's Complaint.

The matter will be set down for trial at a future date.

BY THE COURT:

/s/ Cynthia M. Rufe

FOOTNOTES

[1] *Elliott & Frantz, Inc. v. Ingersoll Rand Co.*, 457 F.3d 312, 318 (3d Cir. 2006).

[2] Hannan testified at his deposition that he could not remember how much he had had to drink that night. Hannan Dep., 32:21, Oct. 12, 2006.

[3] *Id.* 22:13.

[4] *Id.* 22:22.

[5] *Id.* 23:22.

[6] *Id.* 24:3.

[7] *Id.*

[8] *Id.* 24:8.

[9] *Id.* 24:12.

[10] *Id.* 24:24.

[11] Id. 25:11.

[12] Pl.'s Exs. in Support of Undisputed Facts [Doc. # 31], Ex. 4.

[13] Johnson Dep. 8:5-7, Oct. 24, 2006.

[14] Id. 10:21-22.

[15] *Id.* 14:18-19; 15:7. CDA is a method that the Commissioner may use to discipline officers directly, without relying on the findings of a Police Board of Inquiry hearing.

[16] *Id.* 17.

[17] Pl.'s Statement of Undisputed Facts, P 45.

[18] Hannan Dep. 52-53.

[19] Id. 53:8.

[20] Pl.'s Exs. in Support of Undisputed Facts [Doc. # 31], Ex. 14.

[21] *Id.*

[22] Johnson Dep. 35:5.

[23] Pl.'s Statement of Undisputed Facts P 54.

[24] Hannan Dep. 13:11.

[25] Pl.'s Statement of Undisputed Facts P 59.

[26] Defs.' Exs. to Reply Br. [Doc. # 34], Ex. 8.

[27] *Id.* at 23.

[28] *Id.*

[29] Fed. R. Civ. P. 56(c).

[30] *Andreoli v. Gates*, 482 F.3d 641, 647 (3d Cir. 2007) (internal citation omitted).

[31] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

[32] *U.S. Const. amend. I.*

[33] *DeHart v. Horn*, 227 F.3d 47, 50 (3d Cir. 2000).

[34] *Hill v. Borough of Kutztown*, 455 F.3d 225, 243 (3d Cir. 2006)

[35] Id.

[36] *Calif. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

[37] *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) (advertising campaign designed to influence legislation protected under Petition Clause).
[38] *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965) (labor union's efforts to persuade [*15] Secretary of Labor to change minimum-wage rules protected under Petition Clause).
[39] *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.").
[40] 30 F.3d 424 (3d Cir. 1994).
[41] See, e.g., *Altman v. Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984) (police officer reassigned as an act of retaliation for filing a civil suit against his employer not protected under the Petition Clause, because "a private office dispute cannot be constitutionalized merely by filing a legal action").
[42] *San Filippo*, at 442.
[43] Bill Johnson's Restaurants, Inc., 461 U.S. at 743.
[44] See, e.g., *Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003) (noting that timing of retaliation, without additional evidence, must be "unusually suggestive" to support inference of causation).
[45] Id.
[46] See *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997) (in determining causation in retaliation case, "proffered evidence, looked at as a whole, may suffice to raise the inference."); see also *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279-81 (3d Cir. 2000) (collecting retaliation cases illustrating a variety of circumstances under which record as a whole was held to support a prima facie case of causation).
[47] Hannan Dep. 52:19-20.
[48] Id.
[49] Id. 72:24.
[50] Defs.' Exs. To Reply Br. [Doc.# 34], Ex. 6.
[51] *Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005).

[52] Johnson Dep. 35:7-14

[53] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) at summary judgment, court "may not make credibility determinations or weigh the evidence").

[54] Compl. P 20.

[55] Id.

[56] *Id.* P 21.

[57] *U.S. Const. amend XIV, § 1.*

[58] *Hill v. Borough of Kutztown*, 455 F.3d 225, 233 (3d Cir. 2006).

[59] The parties have not briefed the Court on this issue. The Supreme Court has stated that "[p]roperty interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (internal quotation and citation omitted). The parties have not pointed to any source of law--Pennsylvania state law or otherwise--that defines whether Hannan's right to maintain his position within the Department is a protected property entitlement. Therefore, the Court has not addressed the issue.

[60] *McDaniels v. Flick*, 59 F.3d 446, 454 (3d Cir. 1995) (quoting *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)).

[61] Id

[62] *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003) (citing Schweiker v. McClure, 456 U.S. 188, 195, 102 S. Ct. 1665, 72 L. Ed. 2d 1 (1982)).

[63] 59 F.3d 446 (3d Cir. 1995).

[64] Id. at 460 (quoting *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990)).

[65] Id.

[66] *Dykes v. Southeastern Pa. Transp. Auth.*, 68 F.3d 1564, 1571 (3d Cir. 1995).

[67] S. *Const. amend XIV, § 1.*

[68] The Court will dispose of two of [*29] these theories in short order. First, Hannan suggests that the Defendants violated his equal-protection rights by denying him due process. The Court, however, has already reviewed Hannan's claim for relief brought directly under the due-process clause, and therefore will not undertake another due-process analysis "through" the equal-protection clause. Hannan does not cite to any legal authority--nor does the Court independently know of any--that establishes a separate due-process analysis through the lens of the equal-protection clause

[69] 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000).

[70] *Hill*, 455 F.3d at 239.

[71] Pl.'s Opp'n [Doc.# 30], at 11.

[72] Pl.'s Statement of Undisputed Facts P 66.

[73] Hannan Dep. 111-25.

[74] Id. 112:2-11

[75] Id.

[76] Id. 121:17-122:23.

[77] *Amnesty Am. v. Town of W. Hartford*, 288 F.3d 467, 470 (2d CCir. 2002); *see also Dawley v. Erie Indem. Co., 100 Fed. Appx. 877, 881 (3d Cir. 2004)* ("Rule 56 does not oblige a district court to scour the entire record to find a factual dispute.").

[78] Answer to Am. Compl., at 21.

[79] *Kopec v. Tate*, 361 F.3d 772, 776 (3d Cir. 2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

[80] *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

[81] Id. at 201-02.

[82] *See id. at 202* (early qualified-immunity determination appropriate to "'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment'") (quoting Harlow, 457 U.S. at 818).

[83] See, e.g., *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) (dismissing interlocutory appeal from district court's pretrial decision to deny three police officers qualified immunity, because there was a factual dispute as to

whether they were present at the beating that was the subject of the lawsuit).

[84] *Kopec*, 361 F.3d at 776 (emphasis added).

[85] *See, e.g., Monteiro v. City of Elizabeth, 436 F.3d 397 (3d Cir. 2006)* [*36] (in First Amendment-retaliation case, question of whether defendant's motivation in ejecting town councilmember was constitutionally permissible was properly reserved for the jury*); Barton v. Curtis, No. 06-3336, 497 F.3d 331, 2007 U.S. App. LEX IS 18065 (3d Cir. July 30, 2007)* (dismissing interlocutory appeal of Fourth Amendment wrongful-arrest case, in which district court submitted to the jury the question of defendant's state of mind in filing a probable-cause affidavit in support of arrest warrant).

[86] *Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002).

[87] 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

[88] *Brennan v. Norton*, 350 F.3d 399, 427 (3d Cir. 2003).

[89] Id.

[90] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

[91] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 118, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988).

[92] *See, e.g., LaVerdure v. County of Montgomery, 324 F.3d 123, 125 (3d Cir. 2003)* (single member of County Board of Commissioners did not have final policymaking authority to bind the municipal defendant, because under a Pennsylvania state statute, only a majority of the three-member board is authorized to establish policy).

[93] See Pl.'s Opp'n, at 35.

[94] *Brennan*, 350 F.3d at 428.

[95] The Court notes that municipal liability can also flow from an unconstitutional governmental custom. Hannan does not argue, nor does the Court independently find, that Commissioner Johnson's acts were a custom that could properly support a claim for liability against the City.

[96] *Farber v. City of Paterson*, 440 F.3d 131, 134 (3d Cir. 2006) [*41] (internal quotation and citation omitted).

[97] Pl.'s Opp'n [Doc.# 30], at 13-15.

[98] Compl. P 48.

[99] Compl. P 87. The Court presumes that this is a reference to the *Health Insurance Portability and Accountability Act of 1996* ("HIPAA"), Pub. L. 104-191, 110 Stat. 1936 (codified in scattered sections of Titles 18, 26, 29, and 42 of the U.S. Code).

[100] 50 P.S. § 7111.

[101] Id. § 7111(a).

[102] Pl.'s Exs. in Support of Undisputed Facts [Doc. # 31], Ex. 19.

[103] 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

[104] *Hoy v. Angelone*, 554 Pa. 134, 151, 720 A.2d 745 (1998) (quoting Restatement (Second) of Torts § 46 (1) (1965)).

[105] *Buczek v. First Nat'l Bank of Mifflintown, 366 Pa. Super. 551, 558, 531 A.2d 1122 (1987).*

[106] *Hoy*, 554 Pa. at 151 [*45] (*quoting Restatement (Second) of Torts § 46 cmt. d (1965)*).

[107] Id.

[108] Id. at 152.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 07-4548

JEFFERY HANNAN,
Appellee,
v.
CITY OF PHILADELPHIA; SYLVESTER JOHNSON; KAREN BIRD; WILLIAM BLACKBURN, Sued individually and in official capacity, held liable jointly and severally
Sylvester Johnson,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 05-cv-02863)
District Judge: Honorable Cynthia M. Rufe

Submitted Under Third Circuit LAR 34.1(a)
January 6, 2009

Before: CHAGARES, HARDIMAN, *Circuit Judges* and GARBIS,* *District Judge*

(Filed: January 15, 2009)

*The Honorable Marvin J. Garbis, United States District Judge for District of Maryland, sitting by designation.

OPINION OF THE COURT

HARDIMAN, *Circuit Judge*.

Philadelphia Police Commissioner Sylvester Johnson appeals the District Court's denial of his summary judgment motion seeking qualified immunity in a suit brought by Officer Jeffery Hannan alleging that Johnson, among others, violated his First Amendment petition rights. We find that Hannan was not engaged in protected petition activity and Johnson did not violate clearly established law. Accordingly, we will reverse.

I.

Because we write solely for the benefit of the parties, we recite only the facts essential to our decision.

The Philadelphia Police Department brought disciplinary charges against Hannan for conduct unbecoming a police officer following an incident at a statewide training academy. Upon being presented with the charges by the Charging Unit of the Department's Police Board of Inquiry (PBI), Hannan was instructed to sign "guilty" or "not guilty," or else agree to a transfer out of his unit, the elite Narcotics Strike Force. Hannan chose to sign the charges "not guilty" and requested a hearing before the PBI.

Under the Department's disciplinary scheme, the PBI has advisory authority and it recommends to the Police Commissioner whether officers should be

disciplined or penalized. The Police Commissioner then decides whether to accept or reject the PBI's recommendation. Further, [*737] the PBI review is not a mandatory part of the disciplinary process; the Commissioner can take direct action without using the PBI.

Here, the PBI unanimously voted to find Hannan "not guilty" of the charge. Nonetheless, Commissioner Johnson exercised his authority to depart from the PBI's recommendation by transferring Hannan out of the Narcotics Strike Force and suspending him for 15 days without pay.[1]

Hannan alleges that Johnson disciplined him more harshly because he pleaded "not guilty" and opted to challenge the charges against him before the PBI. Hannan sued the City of Philadelphia and various individual defendants alleging violations of state and federal law. Defendants moved for summary judgment and the only claim that survived was Hannan's First Amendment Petition Clause claim against Johnson. [2]Johnson filed a Motion for Reconsideration or, in the Alternative, Renewed Motion for Summary Judgment, which the District

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[1] The transfer and suspension were later overturned [**3] by an arbitrator after Hannan filed a grievance pursuant to the Department's Collective Bargaining Agreement.

[2] Hannan does not contest the District Court's grant of summary judgment to Johnson and the other defendants on his other claims.

Court denied. Johnson now brings this interlocutory appeal.

II.

We exercise jurisdiction over a denial of summary judgment based on a lack of qualified immunity pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. *Schieber v. City of Philadelphia*, 320 F.3d 409, 415 (3d Cir. 2003).[3] In reviewing a denial of summary judgment on qualified immunity grounds, we view the facts in the light most favorable to the nonmoving party. *Kopec v. Tate*, 361 F.3d 772, 775 (3d Cir. 2004). Our review is

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[3] Hannan disputes our jurisdiction, arguing that the collateral order doctrine does not apply to a denial of qualified immunity at the summary judgment stage to the extent that the denial turns on questions of fact, not law. However, Johnson does not dispute the facts in this case. Instead, Johnson argues that even if he took an adverse employment action against Hannan due to his participation in the PBI process, it was not actionable because Hannan's participation in the PBI process was not protected petition activity under the First Amendment. Johnson's motive -- which is a factual question -- is therefore immaterial. Accepting the facts as given, we must decide if those facts show a violation of "clearly established" law. Johnson v. Jones, 515 U.S. 304, 315, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995); Walker v. Horn, 286 F.3d 705, 707 (3d Cir. 2002). We disagree with the District Court's contention that what amounts to a petition under the Petition Clause is a fact-intensive analysis. The question of whether particular conduct is protected by the First Amendment is a legal matter which is appropriate for our interlocutory review. See Mitchell v. Forsyth, 472 U.S. 511, 527-28, 105 S. Ct. 2806, 86 L. Ed. 2d 411,

plenary. Eddy v. V.I. Water & Power Auth., 256 F.3d 204, 208 (3d Cir. 2001).

A court ruling upon a qualified immunity issue must undertake a two-step inquiry: (1) whether a constitutional right would have been violated on the facts alleged; and (2) whether that constitutional right was "clearly established" such that granting immunity would be improper. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); *Doe v. Groody*, 361 F.3d 232, 237-38 (3d Cir. 2004).

A.

The First Amendment, applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." *U.S. CONST. amend. I.* Hannan``` asserts that pleading "not guilty" to the disciplinary charges before the PBI constituted a petition that was protected under the First Amendment. We disagree.

We have held that lawsuits and grievances directed at a government employer or public officials which invoke the formal mechanism for the redress of grievances are protected petitions under the First Amendment, even where they only address matters of private concern. *San Filippo v. Bongiovanni,* 30 F.3d 424, 439-40 (3d Cir. 1994). [**6] In this case,

however, the Charging Unit brought formal disciplinary charges against Hannan and presented them to him with instructions to either "plead guilty and waive a hearing" or "plead not guilty and request a hearing." Hannan was merely a responsive party; the process was invoked by the Charging Unit, a component of the PBI. Hannan did not, as he alleges, initiate or invoke the PBI process; he was ordered to cooperate and his compelled plea does not fall within the constitutional protections for petitions to the government. *See Foraker v. Chaffinch, 501 F.3d 231, 238 (3d Cir. 2007).* [4]

The Department was not "required to recognize as a 'petition' whatever particular communication is so characterized" by Hannan. *San Filippo*, 30 F.3d at 442. The District Court erred when it conflated a due process right to a name-clearing hearing with petition activity under the First Amendment. Hannan may have had a due process right under the Fourteenth Amendment to clear his name following the imposition of discipline; but the right to clear one's name is satisfied by the formal grievance and arbitration procedures established by the Department, not by the hearing to which Hannan was forced to respond.

Pleading not guilty to a PBI charge cannot, as

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[4] Foraker was decided just days after the District Court's initial summary judgment denial and served as the basis for Johnson's Motion for Reconsideration.

a matter of law, constitute a petition for redress of grievances under the First Amendment. To gain protection under the Petition Clause, the action must be initiated by the citizen. Here, Hannan's plea was made under government compulsion, which is inconsistent with the basic principle of freedom underlying the Petition Clause. *See Foraker, 501 F.3d at 238.* Therefore, Hannan cannot establish that the conduct which triggered his retaliatory discharge was protected under the First Amendment and Johnson did not violate his constitutional rights (Saucier step one).

B.

Johnson also prevails at step two of the Saucier inquiry. Even if pleading not guilty in a PBI proceeding constituted protected petition activity, we cannot say that the law is clearly established on that point. *See Saucier, 533 U.S. at 201.*

Qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). The law regarding Hannan's petition was not "sufficiently clear that a reasonable official would understand that what he is doing" violated a constitutional right. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Where there is a "legitimate question" as to whether conduct violates the Constitution, it cannot be said that such conduct violates clearly established law.

Mitchell, 472 U.S. at 535 n.12. Even if Johnson's actions had been unlawful -- and we have found that they were not -- that unlawfulness was not apparent in light of preexisting law. See [*739] Anderson, 483 U.S. at 640. Because Johnson did not violate "clearly established law of which a reasonable person would have known," he should have been granted qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

III.

In sum, Johnson prevails for two independent reasons: (1) Hannan's response does not constitute protected petition activity under the First Amendment; and (2) the law is not "clearly established" on that point such that Johnson should be denied qualified immunity. We will reverse the judgment of the District Court and remand the case for the entry of summary judgment in favor of Commissioner Johnson.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1562

JEFFERY HANNAN,
Appellant,
v.
CITY OF PHILADELPHIA; SYLVESTER JOHNSON; KAREN BIRD; WILLIAM BLACKBURN, SUED INDIVIDUALLY AND IN OFFICIAL CAPACITY, HELD LIABLE JOINTLY AND SEVERALLY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civ. No. 2-05-cv-02863)
District Judge: Hon. Cynthia Rufe

Submitted Under Third Circuit L.A.R. 34.1(a)
March 8, 2010

Before: McKEE, *Chief Circuit Judge*, BARRY and GREENBERG, *Circuit Judges*

(Opinion Filed: November 3, 2010)

OPINION

McKEE, *Chief Judge*:

Police Officer Jeffery Hannan appeals the district court's grant of summary judgment in favor of the City of Philadelphia, Police Commissioner Sylvester Johnson, Karen Bird, Karen Simmons and William Blackburn (referred to collectively as "Defendants"). For the reasons set forth below, we will affirm.[5]

I.

Since we are writing primarily for the parties who are familiar with this case, we need not recite the factual or procedural history of this dispute. Hannan argues that the district court erred in granting summary judgment in favor of the Defendants on the following claims: 1) due process; 2) violations of constitutional and statutory privacy rights; 3) equal protection; 4) the intentional infliction of emotional distress; 5) retaliation for engaging in protected petition activity under the First Amendment, and 6) municipal liability. The appeal is meritless.

II.

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[5] We have jurisdiction pursuant to 28 U.S.C. ' 1291 and exercise plenary review over a grant of summary judgment. *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988). Under FED. R. CIV. P. 56(c), a party is entitled to summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

A. Officer Hannan's Due Process, Privacy, Equal Protection, and Intentional Infliction of Emotional Distress Claims.

In her Memorandum and Opinion, Judge Rufe carefully and thoughtfully explains: why Officer Hannan's arbitration proceedings provided him with all the process he was due, that there was no factual basis to sustain any of his privacy-related claims, and that both the equal protection and intentional infliction of emotional distress claims failed as a matter of law. Since we can add little to Judge Rufe's well-reasoned explanation of why the Defendants are entitled to judgment as a matter of law on these claims, we will affirm the district court's grant of summary judgment on each of those claims substantially for the reasons set forth in that Memorandum Opinion and Order. *See Hannan v. City of Phila.*, Civil No. 05-2863, 2007 WL 2407100 (E.D. Pa. Aug. 22, 2007).

B. Officer Hannan's First Amendment Retaliation Claim.

After the district court allowed Officer Hannan's First Amendment retaliation claim to proceed to trial, Commissioner Johnson filed an interlocutory appeal challenging the district court's rejection of his qualified immunity defense. We reversed and remanded for entry of summary judgment on the First Amendment claim. Since Officer Hannan now appeals the district court's subsequent entry of summary judgment, he is in effect asking us to reconsider our holding that his

First Amendment claim fails as a matter of law. We refuse to do so.[6]

Officer Hannan also offers a new theory to support his First Amendment retaliation claim. He argues that Commissioner Johnson's decision to suspend him was in retaliation for the grievance Hannan filed in response to his transfer. Although this issue was raised in count five of Officer Hannan's amended complaint, it was not argued before the district court.

In general, we will not address any issue raised for the first time during appeal because the plaintiff is deemed to have waived it. *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 116 (3d Cir. 1992). The rule is no different where, as here, an appellant has made a cursory reference to the theory in an amended complaint. That is simply not enough to preserve the issue for appeal. *See Reichly v. Pa. Dep't of Agric.*, 427 F.3d 236, 247 n.14 (3d Cir. 2005) ("While that claim is included in their amended complaint, that is not sufficient to preserve the issue

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[6] Officer Hannan argues that we did not have jurisdiction to hear Commissioner Johnson's interlocutory appeal, or that we erred in ruling that Officer Hannan's plea was not protected under the First Amendment. In *Hannan v. City of Phila.*, we rejected these same arguments. We held that: "[t]he question of whether particular conduct is protected by the First Amendment is a legal matter which is appropriate for our interlocutory review." 306 F. App=x 735, 737 n.3 (3d Cir. 2010). We also held that Officer Hannan's guilty plea was not a protected activity under the First Amendment. His attempt to ask us to reverse that ruling in this appeal is frivolous at best and merits no discussion. *See id.* at 738.

for appeal."). Accordingly, we need not address that claim now.

Because Officer Hannan cannot establish that he engaged in protected activity, the retaliation claim was properly dismissed.

C. Officer Hannan's Municipal Liability Claim.

Since there was no violation of Officer Hannan's constitutional rights, there can be no constitutional violation for which the City of Philadelphia could be held liable under Section 1983. *See Brown v. Commonwealth of Pa., Dep't of Emergency Med. Servs.*, 318 F.3d 473, 482 (3d Cir. 2003). Moreover, the record here is totally devoid of even a suggestion of the kind of "practice or policy" evidence required for municipal liability under ' 1983. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

III.

For the foregoing reasons, we will affirm the decision of the district court granting summary judgment in favor of the Defendants on each of Hannan's claims.

Case: 09-1562 Document: 003110336584

Date Filed: 11/03/2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1562

Jeffery Hannan,
Appellant
V.

City Of Philadelphia; Sylvester Johnson; Karen Bird; William Blackburn, Sued Individually And In Official Capacity, Held Liable Jointly And Severally

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Present: Mckee, Chief Judge, Scirica, Sloviter, Rendell, Barry, Ambro, Fuentes, Smith, Fisher, Chagares, Jordan, Hardiman, Greenaway, Jr., Vanaskie And Greenberg* , Circuit Judges

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Sur Petition For Panel Rehearing
With Suggestion For Rehearing *En Banc*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Theodore A. McKee

Chief Judge DATED: December 21, 2010 *The vote of Judge Greenberg is limited to panel rehearing only.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1562

JEFFERY HANNAN, *Appellant*,

v.

CITY OF PHILADELPHIA; SYLVESTER JOHNSON; KAREN BIRD; WILLIAM BLACKBURN, SUED INDIVIDUALLY AND IN OFFICIAL CAPACITY, HELD LIABLE JOINTLY AND SEVERALLY

On Appeal from the United States District Court for the Eastern District of Pennsylvania (Civ. No. 2-05-cv-02863) District Judge: Hon. Cynthia Rufe

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Submitted Under Third Circuit L.A.R. 34.1(a) March 8, 2010

Before: McKEE, *Chief Circuit Judge*, BARRY and GREENBERG, *Circuit Judges*

(Opinion Filed: December 29, 2010)

OPINION

McKEE, *Chief Judge*:

Police Officer Jeffery Hannan appeals the district court's grant of summary judgment in favor of the City of Philadelphia, Police Commissioner Sylvester Johnson, Karen Bird, Karen Simmons and William Blackburn (referred to collectively as "Defendants"). For the reasons set forth below, we will affirm.[17]

I.

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II.

A. Officer Hannan's Due Process, Privacy, Equal Protection, and Intentional Infliction of Emotional Distress Claims.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1562

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Appellant,
v.
CITY OF PHILADELPHIA; SYLVESTER JOHNSON; KAREN BIRD; WILLIAM BLACKBURN, SUED INDIVIDUALLY AND IN OFFICIAL CAPACITY, HELD LIABLE JOINTLY AND SEVERALLY

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District Judge: Hon. Cynthia Rufe

Submitted Under Third Circuit L.A.R. 34.1(a)
March 8, 2010

Before: McKEE, *Chief Circuit Judge*, BARRY and GREENBERG, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on March 8, 2010.

On consideration whereof, it is hereby ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered February 2, 2009, is affirmed. All of the above in accordance with the opinion of this Court.

Costs taxed against Appellant.

ATTEST:
/s/ Marcia M. Waldron
Clerk

Date: November 3, 2010

Case: 09-1562 Document: 003110392524
Date Filed: 12/29/2010.